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Supreme Court of the United States

October Term, 1967

No. 968

BANCO NACIONAL DE CUBA,

Petitioner,

against

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 27, 1967

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No.

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F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.,

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COMPANIA AZUCARERA CERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Banco Nacional de Cuba respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on July 31, 1967, affirming an order and judgment of the District Court for the Southern District of New York, dismissing the complaint herein.

Opinions Below

The District Court's opinions are reported at 243 F. Supp. 957 and 272 F. Supp. 836 (July 30 and November 15, 1965, respectively). The Court of Appeals' opinion is reported at 38[illegible] F. 2d 166. The two opinions of the District

Court and the opinion of the Court of Appeals, together with the judgments of those courts are appended hereto, beginning at page 29.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1967 (p. 64a, *infra*). By order of Mr. Justice Harlan, dated October 23, 1967, petitioner's time to file this petition was extended to December 28, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Hickenlooper amendment[1] constitute an unconstitutional interference with both the Judicial and Executive branches in that (a) it directs the court to decide a question which this Court has already found to be non-justiciable and (b) it interferes with the President's conduct of foreign affairs?

2. Does the nationalization, within Cuba, of the property of a Cuban corporation present a question of international law by virtue of the fact that most of its stockholders are United States citizens?

3. Both in terms of statutory interpretation and in terms of constitutionality, should the Hickenlooper amendment be given retroactive effect so that it is made applicable to causes of action arising out of transactions completed at the time of its enactment and particularly

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[1] Pub. L. 88-633, § 301(d)(4), 78 Stat. 1009, 1013, as amended by Pub. L. 89-171, § 301(d), 79 Stat. 659. The statute is codified at 22 U.S.C. § 2370(e)(2). It was referred to by the court below as the Hickenlooper amendment. In some Congressional debates and law review articles it is referred to as the Sabbatino amendment.

to this case, the issues in which have already been decided by this Court?

4. Did the Cuban government violate international law when it nationalized the property of Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter C.A.V.)?

5. Assuming that all previous issues are decided adversely to petitioner, is the respondent C.A.V. entitled to the remedy of restitution for the sugar seized?

Statutes Involved

Public L. 88-633, § 301(d)(4), 78 Stat. 1009, 1013, reads as follows:

> "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966."

The 89th Congress amended the section by striking the third proviso, and by substituting "other right to property" in place of "other right" in two instances. Public L. 89-171, § 301(d), 79 Stat. 659.

The Hickenlooper amendment refers to "other standards set out in this subsection". Presumably that refers to 22 U.S.C. § 2370(e)(1), Public L. 88-205, Pt. III § 301(e), 77 Stat. 386, which reads as follows:

> "(e)(1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962—
>
> (A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens,
>
> * * *
>
> and any such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and no other provision of this chapter shall be construed to authorize the President to waive the provisions of this subsection."

Statement of the Case

The jurisdiction of the District Court was originally invoked under:

(a) 28 U.S.C. § 1332, in that petitioner is a foreign corporation, having been organized under the laws of the Republic of Cuba, and defendants are citizens of the States of New York, New Jersey and Florida.

(b) 28 U.S.C. § 1331, in that this action arises under the Constitution of the United States, and more particularly under Article III which gives to the President sole and exclusive power to conduct foreign relations on behalf of the United States, under Article I, Section 8, Clause 3 of the Constitution, and under the Fourteenth Amendment to the Constitution.

The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

Facts

This case is a sequel to *Banco Nacional de Cuba* v. *Sabbatino et al.*, 376 U.S. 398. The facts are fully developed in the Court's opinion in that case and are not, at this point, in dispute. Briefly, respondent Farr, Whitlock & Co., a commodity broker (hereinafter Farr), early in 1960, entered into contracts for the purchase of sugar from C.A.V., a Cuban corporation whose stock was owned principally by United States residents. The sugar was to be paid for in New York upon presentation of shipping documents and a sight draft. On August 6, 1960, before delivery of the sugar had been made, Cuba nationalized the property of C.A.V. Five days later Farr entered into contracts with a Cuban public corporation, identical in terms with the original contracts between Farr and C.A.V. On the same day the sugar in question was shipped from Cuba to Morocco.

The shipping documents were assigned to petitioner, also a Cuban public corporation and they, together with the draft, were duly presented to Farr in New York on August 26, 1960. By a trick, Farr managed to secure possession of the documents without payment of the draft. It received payment for the sugar from its customer but refused to turn over the proceeds to petitioner. Shortly thereafter Farr was served with an order of the New York Supreme Court, which had appointed Sabbatino as temporary receiver of C.A.V. pursuant to § 977b of the Civil Practice Act of New York.[1a]

Thereupon petitioner brought this action and moved for summary judgment. The District Court denied its motion for summary judgment and granted summary judgment for defendants, 193 F. Supp. 375 (1961). That judgment was affirmed by the Court of Appeals, 307 F. 2d 845 (1962). This Court reversed and remanded the case to the District Court "for further proceedings in conformity with the opinion of this Court". Accordingly, petitioner moved on May 14, 1964, for the entry of final judgment in its favor (J.A. 5a).[2] This motion was never decided. On September 18, 1964, respondent Farr moved for leave to join C.A.V. and Lehman Brothers as third party defendants; on the same day the parties stipulated to drop Mr. Sabbatino as a party defendant, he having been discharged as Receiver (J.A. 2a). Respondent's motion was granted on October 30, 1964, and an order to that effect was entered on November 12, 1964.

In the meantime and on October 7, 1964, Congress enacted, and the President signed, the Hickenlooper amendment. Farr thereupon moved for summary judgment dismissing the complaint on the strength of the new law (12a).

[1a] In 1963 the receivership was vacated and the funds in question were placed in escrow with Lehman Brothers, where they now repose.

[2] References are to the Joint Appendix in the Court of Appeals, a certified copy of which is being filed herewith.

The motion was granted, but the court withheld entry of judgment for 60 days because of the second proviso of the statute (J.A. 15a-57a). On September 29, 1965, the United States Attorney advised the court that the Executive Branch had made "no determination . . . that the application of the act of state doctrine is required in this case by the foreign policy interests of the United States . . ." and that no such determination was contemplated. Judgment was thereupon entered (J.A. 57a-61a).

Reasons Relied on for the Allowance of the Writ

This Court, of course, is familiar with the issues decided in the *Sabbatino* case. The issues in this proceeding are equally important involving as they do important constitutional questions affecting the separation of powers, as well as the interpretation and application of the most controversial statute passed in the field of international law in decades.

1. The Hickenlooper amendment raises two profound questions with respect to the allocation of powers between the three Branches of government. The statute invades both the power of the Judiciary and the power of the Executive.

(a) From the earliest days of the Republic, the Judiciary has closely guarded its independence from either executive or legislative interference. *Hayburn's* Case, 2 U.S. (2 Dall.) 409; *Den* v. *The Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284; *Gordon* v. *United States*, 69 U.S. (2 Wall) 561;[3] *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428; *Postum Cereal* v. *California Fig Nut Co.*, 272 U.S. 693; *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464.

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[3] For a detailed discussion of the facts, see the opinion prepared for the Court by Chief Justice Taney, printed at 117 U.S. 567.

This Court has already decided that the validity of the taking of property by a foreign sovereign government within its own territory is not a subject for judicial determination (*Sabbatino* at 428). Congress may not compel it to make such a determination.

In its decision in *Baker* v. *Carr*, 369 U.S. 186, this Court set down the circumstances under which it would hold certain kinds of political questions to be nonjusticiable. The Court said, at p. 217:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Virtually all of the elements there discussed by the Court can be found in this record. This case involves foreign relations, an issue constitutionally committed to the Executive Branch (*Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302; *Baker* v. *Carr, supra,* at 246; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320); there is "a lack of judicially discoverable and manageable standards for resolving it" (see *Banco Nacional* v. *Sabbatino, supra,* at 428-430); the case is impossible to decide "without an

initial policy determination of a kind clearly for nonjudicial discretion"; the court cannot undertake "independent resolution [of the issue] without expressing lack of the respect due" the Executive Branch; there is "an unusual need for unquestioning adherence to a political decision already made" and there is a great "potentiality of embarrassment from multifarious pronouncements of various departments on one question."

The last few considerations deserve special attention, for the potentiality of embarrassment to the Executive Branch and the need for unquestioning judicial adherence to political decisions already made are nowhere better illustrated than in this case. The State Department has twice protested, through diplomatic channels, that the Cuban nationalizations violated international law. 43 Department of State Bull. 171, 316 (1960). In terms of the need that our government should speak with a single voice in the area of foreign affairs, the courts were then and there committed if the principle of *Sabbatino* were to be discarded; they could not make a contrary decision without serious embarrassment to the Executive Branch and injury to the national interest. These pronouncements by the State Department have been heavily relied on by the respondents at all stages of this case,[4] and see the District Court opinion in *Sabbatino*, 193 F. Supp. at 381 where, also, reliance is placed on the State Department views.[5] The Court of Appeals, in *Sabbatino*, carefully refrained from such reliance, but cited instead similar State Department views in prior similar cases, 307 F.2d at 862.

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[4] See, for instance, brief of respondent Farr on writ of certiorari in *Sabbatino* case, pp. 38-46.

[5] Significantly, the District Court there cited State Department views as proving that there was no possibility of embarrassment. Of course not—but only so long as the court agreed with the State Department.

An even more striking illustration of a potential conflict between the Judiciary and the Executive arose in 1961 in connection with the *Bahia de Nipe* litigation, *Rich* v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va. 1961), *aff'd* 295 F. 2d 24 (4th Cir. 1961), *applications for stay denied*, United States Supreme Court, September 11, 12 and 14, 1961. That was a case in which the State Department took a position consistent with that taken by the petitioner in this case. On the strength of the act of state doctrine this Court refused to interfere at the suit of the owner of surgar. The facts are important and are set forth in a footnote.[5a] See also the reply brief submitted by the petitioner on the writ of certiorari in *Sabbatino*, at page 12. It will be noted that had the Hickenlooper amendment been the law in 1961, serious embarrassment to the Executive Branch would have ensued if the court had come to a conclusion contrary to the policy determination already made by the State Department.

[5a] On July 24, 1961, an armed passenger "hijacked" an Eastern Airlines plane with passengers and crew aboard and forced the pilot to take the plane to Havana (New York Times, July 25, 1961). The plane was returned by the Cuban Government on August 16 (New York Times, August 17, p. 8, col. 6). The very next day the captain of the Cuban freighter, Bahia de Nipe, "hijacked" that ship and brought it into Chesapeake Bay (New York Times, August 18, p. 8, col. 3). It was obvious that from the political point of view the United States could not refuse to return the freighter and its cargo in view of the close proximity both in fact and in time to the Eastern Airlines incident. Certainly, we could not do less than Cuba had done on the very day preceding.

A claim for the cargo on the ship was made by United Fruit Company, the basis for the claim being *exactly* the same as the basis for the claim made by C.A.V. The same Cuban decree was involved, the same violations of international law were alleged, the same "lack of compensation" was present and, indeed, United Fruit relied on the District Court decision in *Sabbatino*. The District Court, the Court of Appeals and this Court all refused to pass on United Fruit's claim "on the merits".

Many of these problems were discussed by a memorandum prepared by the State Department for the House Committee hearings in 1965 considering extension of the Hickenlooper amendment. The relevant portions of that memorandum are annexed as Appendix A hereto.[6] As it there appears, the State Department opposed the Hickenlooper amendment, for all of the reasons set forth above.

The provision of the Hickenlooper amendment enabling the President to invoke the act of state doctrine in a particular case does not avoid the problem, since such action by the President might, in itself, prove embarrassing to the Executive Branch. See State Department statement, Appendix A, p. 26 below. Abraham Chayes, Legal Adviser to the State Department at the time of the *Sabbatino* presentation to this Court, speaking at a meeting of the Bar Association of the City of New York on January 11, 1965, referred to the elements of embarrassment mentioned above and went on to say:

> "... Present legislation is that it makes it awfully difficult for the Executive to carry on relations with a foreign government in the face of an effort to adjudicate ... because the foreign government is not always going to be Cuba; it might be Chile or Brazil or a number of other countries with whom our relations have not broken down at all, and as soon as the case is filed they are going to turn around and ... ask the State Department to prevent litigation, to ask them to get the President to say that the foreign relations of the United States require that there should be no litigation here."[7]

We do not argue that all "political questions" or even all "foreign relations questions" are nonjusticiable.

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[6] Text supplied to counsel by State Department. We are advised by the Department that the statement was distributed to the Committee but it does not appear in the printed hearings because the witness for the State Department, Mr. Leonard Meeker, Legal Advisor, was never given an opportunity to testify.

[7] A transcript of these remarks is available from the Bar Association.

Baker v. *Carr, supra,* at 211. But only a court can determine which political questions and which foreign relations questions are justiciable and it is not to take direction from any other Branch of the Government on this issue. A determination of nonjusticiability, like a determination of lack of jurisdiction, is an essential part of the exercise of Judicial power. Questions such as these involve many delicate policy considerations arising out of the "court's appropriate place" within our governmental structure. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568. On the issues before the Court in this case, this Court has already spoken.

(b) The statute further represents a legislative interference with Executive power. Many of the observations made above are equally applicable here. The need for preserving, in the hands of the President, the greatest possible flexibility is well recognized. *United States* v. *Curtiss Wright Export Corp.*, 299 U.S. 304, 320; *Chicago & Southern Airlines* v. *Waterman Steamship, Inc.*, 333 U.S. 103. *Cf.* the dissenting opinions of Justices Douglas and Stewart in *Mora* v. *McNamara,* — U.S. —, 36 Law Week 3189 (Nov. 6, 1967).

By the passage of this Act not only has Congress interfered with this power—it has also directed the courts to play a role in guiding our foreign relations, and it has done so over the vigorous protest of the Executive Branch. (See Hearings before Committee on Foreign Relations, United States Senate, 88th Cong., 2d Sess. on S. 2659, 2660, 2662 and H.R. 11380, pp. 618, 619; Hearings Before the Committee on Foreign Affairs, House of Representatives, 89th Cong., 1st Sess. on H.R. 7750, p. 1234; also the Meeker statement, Appendix A hereto.[8]

[8] The Hickenlooper amendment was a rider to the Foreign Aid Bill of 1964 and became law when the President signed the bill on October 7, 1964, after resolution of the annual dispute over foreign aid between Congress and the President. Congress adjourned on the same day.

2. Questions of constitutionality aside, C.A.V., whose property in Cuba was expropriated by the Cuban government, is a Cuban corporation. Hence there is no question of international law before the Court, and the Hickenlooper amendment offers no support to the decision below.

> ". . . Acts of state directed against its own nationals do not give rise to questions of international law." (*Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845 at 361)

See also *Palacio* v. *Brush & Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd.* 375 F. 2d 1011 (1967), *cert. den.* — U.S. —, 36 Law Week 3134 (Oct. 9, 1967).

The courts below, however, disregarded the elementary rule that the nationality of a corporation is determined by the place of its incorporation and not by the imputed nationality of its stockholders. *Louisville C. & C. Railway Co.* v. *Letson*, 43 U.S. (2 How.) 497; *The Pedro*, 175 U.S. 354; *United States* v. *Northwestern Express Stage & Transportation Co.*, 164 U.S. 686; *Puerto Rico* v. *Russell Co.*, 288 U.S. 476.

In *Behn Meyer & Co.* v. *Miller*, 266 U.S. 457, this Court held that a corporation incorporated in a British colony was not an enemy alien in the First World War, even though most of its stockholders were of German nationality. And for the converse, see the *Standard Oil Tankers* Case, 22 Amer. J. Int. L. 404 (1928), in which the arbitrators held that tankers of a German corporation should be turned over to England and France as a part of reparations after World War I, even though 99% of the stock of the corporation was owned by Standard Oil Company of New Jersey.

There is no authority for any other conclusion. The cases cited by the courts below are, for the most part, situations in which the United States, either in diplomatic negotiations, or in arbitration, was presenting a claim on behalf of its nationals who were stockholders in a foreign

corporation; the question of the nationality of the corporation was not at issue. *El Triunfo* (1902) For. Rel. U.S. 859; *Delgoa Bay Railway Co.* (1902) For. Rel. U.S. 848; *Alsop & Co.* (1910) For. Rel. U.S. 138; *Cf.* the *Romano-American* Case (1926) 2 For. Rel. U.S. 308.

The courts below attached significance to the fact that one of the reasons C.A.V. was nationalized by Cuba was that it was largely owned by United States stockholders. But it is our law which is being applied here, not Cuban law. There have been many instances in which expropriations took place precisely because the corporation was foreign-owned. That did not, however, lead to the disregard of the corporate nationality. See, for example, *Janson* v. *Dreifontein Consolidated Mines Ltd.* (1902) A.C. 484; *Daniel* v. *Commissionrs,* 2 Knapp's P.C. Rep. 23 (1825); *Lang* v. *Commissioners,* 2 Knapp's P.C. Rep. 51 (1825).

Endless mischief would arise from a suggestion that the nationality of a corporation can be determined by the nationality of its stockholders when the corporation *qua* corporation is making a claim. How large a proportion of alien stockholders will be required to change the nationality of a corporation? How is a court to determine the nationality of stockholders, as distinguished from their residence?[9] How is a corporation to be treated when its stockholders are of many nationalities? Does the proportion of stockholders who are alien to the nationalizing state affect the amount of the judgment?[10]

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[9] There were 1,443,921 shares of C.A.V. outstanding, held by about 6,000 shareholders. The record is silent as to their nationality; it refers only to their *residence,* which is, of course, quite a different thing, especially in this context.

[10] These are not academic questions. In *Menendez, Garcia & Co.* v. *Glaser Bros.,* now pending in the Superior Court of California, Docket No. 513122, City and County of San Francisco, a partnership organized in Cuba is claiming the benefit of the Hickenlooper amendment because one of the partners is alleged to be a Spanish citizen.

Presumably C.A.V. was incorporated in Cuba because its owners thought the benefits accruing from such incorporation outbalanced the liabilities under Cuban law. One of those liabilities was that it became subject to the right of the sovereign to expropriate its property because it was a Cuban corporation. The decision of the court below relieves it of this liability and gives to it rights not available to other Cuban corporations only because its stockholders are Americans.

3. A threshold question of statutory interpretation is presented as to whether the Hickenlooper amendment is applicable to litigation based on causes of action arising out of transactions completed before its passage.[11] Even if the amendment is applicable to such causes generally, a second question is presented as to whether it is applicable to this case, which was pending in the District Court for the entry of judgment when the law was passed.

(a) The statute itself contains no express language with respect to its retroactivity and there is a presumption

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In *Mann* v. *Trans-Cuba*, pending in the New York State Supreme Court, Index No. 11172/1960, New York County, it appears that many stockholders of the corporation were Cubans and many were Americans. Although the corporation was organized in Cuba, there is no way of ascertaining how many of its stockholders had what citizenship. Indeed, there is not even any way of telling where many of the stockholders live.

[11] The District Court stated that there were "some 35 cases" pending before it which were "likely to be affected if not determined by the decision on the present motions." 243 F. Supp. at 962. Since that time some of these cases have been decided. In *Palicio* v. *Brush & Bloch, supra*, the court held that the Hickenlooper amendment did not apply to the expropriation of the property of Cuban corporations and applied the act of state doctrine. In *Banco Nacional* v. *First National City Bank*, 270 F. Supp. 1004 (1967), the court denied plaintiff's motion for summary judgment on the ground that the Hickenlooper amendment did apply. There are many other cases still pending undecided.

that past transactions are excluded. "Retroactivity [of legislation], even where permissible, is not favored except upon the clearest mandate" *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164. To the same effect see *Hasset* v. *Welch*, 303 U.S. 303, 314; *Greene* v. *United States*, 376 U.S. 149, 160; *Davis* v. *Wechsler*, 263 U.S. 22, 25.

The Court of Appeals found support for its conclusion in the provision of the amendment specifying that it was intended to apply to:

> "... a case in which a claim of title or other right to property is asserted by ... a foreign state (or a party claiming through such state) based upon ... a confiscation or other taking after January 1, 1959 ..."

If title based on such a confiscation had been acquired after adoption of the Hickenlooper amendment, we would agree that there is no question of retroactivity. But here title based upon such a confiscation was acquired prior to the law. Title to property cannot be transferred by legislative fiat without raising serious constitutional questions.

As the Court of Appeals points out, 383 F. 2d at 173, none of the cases cited by it to support its flat proposition "that a case must be decided according to the law as its exists at the time of final judgment" is directly in point—indeed neither the courts below nor respondent has cited such a case.

The legislative history of the Hickenlooper amendment is not too clear. On the one hand Senator Hickenlooper said, when the 1964 statute was under consideration:

> "The Amendment ... does not change the Court's decision in [Banco Nacional de Cuba v. Sabbatino]. Rather, the Amendment clarifies public policy ap-

> plicable to such cases pursuant to Congress [sic] constitutional power to legislate concerning the aid program, foreign commerce and offenses against international law." (110 Cong. Rec. 19557, August 14, 1964)

Other statements from the debate were read by the Court of Appeals as indicating a contrary purpose. (110 Cong. Rec. 19547 Aug. 14, 1964). At the next session of Congress (while petitioner's motion was pending undecided in the District Court), both Senator Hickenlooper and the report of the Senate Committee sought to interpret what Congress had meant at the previous session. S. Rep. No. 170, 89th Cong., 1st Sess. 19 (1965); 111 Cong. Rec. 13544, (1965). Such statements are entitled to little weight. *United States* v. *Price,* 361 U.S. 304; cf. *United States* v. *United Mine Workers,* 330 U.S. 258, 281-282.

The net result is both a statute and a legislative history which are ambiguous; such questions should be resolved against retroactivity, especially in view of the constitutional issues that might otherwise be raised.

(b) This is particularly true here because this case had been decided by this Court before the statute was passed, thus raising a special problem of statutory interpretation. The mandate of this Court did not give the District Court any discretion with respect to a reexamination of any of the issues. *Sibbald* v. *United States,* 37 U.S. (12 Pet.) 488; *In re Sanford Fork & Tool Co.,* 160 U.S. 247; *In re Potts,* 166 U.S. 263; *United States* v. *Parke-Davis & Co.,* 365 U.S. 125; *Briggs* v. *Pennsylvania Railroad Co.,* 334 U.S. 304. It denied a motion to admit C.A.V. as a party without prejudice to a renewal of the motion in the District Court (*Sabbatino,* p. 408); otherwise this Court directed a remand "for proceedings consistent with this opinion" (*ibid.,* p. 439). The District Court certainly did not obey that mandate; it relies, for its disregard of the order of the Court, on the new statute.

But at the time of the passage of the statute, substantially nothing remained to be done but the ministerial act of entering judgment.[12] Had that routine act been carried out (as it should have been automatically) we would not be here now.

(c) It is elementary that a statute ought to be interpreted so as to avoid constitutional questions when possible. The constitutional due process questions raised by a retroactive statute are difficult and such statutes have generally been held invalid. *Swayne and Hoyt* v. *United States*, 300 U.S. 297; *United States* v. *Lynch*, 292 U.S. 571; *Graham* v. *Goodsell*, 282 U.S. 409; *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 248 U.S. 338.

None of the cases relied on by the respondents or by the Court of Appeals are to the contrary. Some, *e.g.*, *Campbell* v. *Holt*, 115 U.S. 620, relate to the retroactivity of a statute of limitations, clearly a special problem. *Chase* v. *Donaldson*, 325 U.S. 304, 313. Others, *e.g.*, the portal to portal cases such as *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254 (2d Cir. 1948), *cert. den.* 335 U.S. 887, relate to the statutory destruction of a right created by statute. Still other cases, *e.g.*, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, did not involve property rights at all and hence are not within the protection of the due process clause.

4. The Hickenlooper amendment directs the court to decide cases involving expropriations allegedly in violation of international law "on the merits." If the statute is constitutional and applicable, this presumably means that the courts must apply substantive rules of international law

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[12] As the recital of facts set forth above shows, at the time the statute was passed, there were two applications pending before the court: one for the entry of judgment and the second for leave to join C.A.V. and Lehman Brothers as third party defendants. Neither application was more than a formality.

to the Cuban expropriations of C.A.V. property in August 1960.

The Court of Appeals conceded that the duty, in international law, to pay compensation for property expropriated was not at all clear. So, in its opinion in *Sabbatino*, p. 846, it sought to "narrow" the question before it and found a violation of international law in the lack of compensation plus the two additional elements of discrimination and retaliation. Since this Court did not find it necessary to pass upon the issue in the *Sabbatino* case, the Court of Appeals, in considering the question a second time in this case, reaffirmed its original opinion.

In fact, however, it is the alleged lack of compensation alone that is at the heart of the problem. Viewed realistically, the additional elements of discrimination and retaliation are, we respectfully submit, only makeweight. Neither of those elements can reasonably be found in the circumstances here. There was no discrimination: Cuba nationalized both Cuban-owned and United States-owned property on precisely the same terms and over a period of many months, so that now substantially all industry in the country has been nationalized. The contention that the Cuban action was "retaliatory" is likewise unsupported. As in most international disputes, it is impossible to tell who is retaliating against whom; the concept of "retaliation is frequently a moral or political concept rather than a legal one and that is certainly true in this case. The nationalization of the sugar companies in 1960 was but one of a series of steps which each government regarded as retaliatory against it.

We are left then with a charge of a violation of international law based on lack of compensation for the property expropriated. But this Court, in *Sabbatino*, pp. 428-430, was unable to find any generally accepted norms of conduct in this regard—and it is the generally accepted usages of

civilized nations, not the due process concepts of Anglo-American jurisprudence, that make up international law. *The Antelope*, 23 U.S. (10 Wheat) 66.[13]

Thus, even if this case is to be decided "on the merits", judgment should be given for petitioner because no international law violation has been established. The law has been fully discussed in the brief submitted by petitioner in this Court in the *Sabbatino* case[14] and will not be repeated in this petition. For recent discussion of the question, see Friedmann, *National Courts and the International Legal Order: Projections on the Implications of the Sabbatino case*, 34 Geo. Wash. L. Rev. 443 (1966); Reeves, *The Act of State—Foreign Decisions Cited in the Sabbatino case: A Rebuttal and Memorandum of Law*, 33 Fordham L. Rev. 599 (1966); Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba* v. *Sabbatino*, 16 Rutgers L. Rev. 1 (1961).

It will not be urged that the Hickenlooper amendment is a model of legislative clarity. But one thing seems quite clear: Congress directed the courts to adjudicate cases described in the amendment not by resort to the act of

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[13] Even in Anglo-American law, concepts of when a government may expropriate the property of an alien and the extent to which compensation must be paid seems to be molded by political, rather than jurisprudential, considerations. In *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106 (2d Cir. 1966), *cert. den.* 385 U.S. 898, the Court of Appeals held that the United States Government could, without violating due process of law, deprive a non-resident alien of his property located within the United States without making any compensation therefor. In that case, which arose under the Cuban Assets Control Regulations, 31 C.F.R. § 515.101, *et seq.*, the additional elements of "discrimination" and "retaliation" could be said to be present at least to the degree to which they were found to exist by the Court of Appeals in *Sabbatino* and in this case.

[14] See petitioner's brief on the writ of certiorari in *Sabbatino*, at pp. 34-51.

state doctrine nor to the principles of municipal law, but by resort to the principles of "international law". The first statutory proviso, which decrees that the amendment shall not be applicable "in any case in which an act of a foreign state is not contrary to international law" was added in conference at the insistence of the House "to pinpoint its precise effect making it clear that it does not apply if no violation of internatonal law prnciples is found . . ." (House Rep. No. 1925, 88th Cong., 2d Sess. 16 [1964]). At two other places in the statute the courts are admonished "to give effect to the principles of international law" in a case involving property expropriated by a foreign state. Since it cannot be said that the Cuban Government violated any principles of international law, "on the merits" judgment should be entered for petitioner.

However, reference will be made to a single clause in the Hickenlooper amendment which refers to a consfication "in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection." See *Banco Nacional de Cuba* v. *First National City Bank of New York,* 270 F. Supp. 1004, 1008 (S.D.N.Y. 1967). This is presumably a reference to subdivision (1) of subsection (e) of 22 U.S.C. § 2370 (p. 4, *supra*), which provides that the President shall suspend assistance to a country which has nationalized the property of United States citizens if such country shall fail within a reasonable time

> "to take appropriate steps . . .to discharge its obligations under international law . . . including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law . . ."

We would suppose that this language constitutes the "principles of compensation" to which subdivision (2) refers; we do not know what subdivision (2) means in its reference to "other standards".

Congress cannot make international law. "As no nation can prescribe a rule for others, none can make a law of nations." *The Antelope, supra,* at 122. Congress may direct that municipal law shall be applied in lieu of international law, but it made no such direction here and in fact repeatedly directed the contrary. And the "principles of compensation" in subdivision (1) bear almost no resemblance to international law or practice. It is abundantly clear that even in cases where diplomatic settlements have provided some degree of compensation, it can rarely be characterized as speedy, is seldom in convertible foreign exchange and is almost never equivalent to the full value of the property taken. Dawson and Weston, "*Prompt, Adequate and Effective*" *A Universal Standard of Compensation?* 30 Fordham L. Rev. 727 (1962).

The Court must therefore interpret statutory language which is inherently inconsistent and contradictory. The crux of the difficulty lies not in the language of the Hickenlooper amendment but rather in the language of subdivision (1) of § 2370(e). The difficulty of construction vanishes if the last clause is read as meaning "equivalent to the full value thereof *to the extent* required by international law". This reading will effectuate the evident intent of Congress that international law should be applied and yet will leave to the courts the determination of the requirements of international law, a usual judicial function. Nor is such a construction of the statute unreasonable. *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.,* 91 U.S. 656; *Mastro Plastics* v. *National Labor Relations Board,* 350 U.S. 270; *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58.

5. Even if we are to assume that Cuba did violate international law the question remains as to the nature of respondent's rights and the method of enforcement of them.

The Court of Appeals in *Sabbatino* found that "since the Cuban decree violated international law, the appellant's title was invalid", 307 F. 2d at 869. This conclusion is unsupported by law and would play havoc with title to goods in international trade. If C.A.V. has any rights at all it is a claim for damages, not restitution; if it has any forum for enforcement of these rights, it is in a diplomatic, not a judicial, forum.

We know of no authority in the field of international law which would disagree with the proposition that a nation has the right to nationalize property within its own borders. "My government has frequently asserted . . . the sovereign fight of any government to expropriate private property within its border in furtherance of public purposes," said Secretary of State Hull in a note addressed to the Mexican Government, (1938) 5 For. Rel. U.S. 674. The wrong, if any, consists in the failure to compensate therefor. We know of no case, either domestic or foreign, which has held that title which passed in a confiscation was void or that restitution is permissible.[15] For a collection of the authorities to this effect, see three articles by Professor Hans Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply,* 54 Amer. J. Int. L. 801 (1960); *The Validity of Foreign Confiscations: An Addendum,* 56 Amer. J. Int. L. 504 (1962); and *The Legal Effect of Cuban Expropriations in the United States* 1963 Duke L. J. 290.

Our own history is replete with illustrations of this principle. When Mexico nationalized the oil properties of British, Dutch and United States oil companies, the companies all sought restitution and they were joined in that demand by Great Britain and The Netherlands. Our State

[15] Except *Anglo-Iranaian Oil Co. Ltd.* v. *Jaffrate* (*The Rosemary*) [1955], 1 Weekly L. R. 246. For a critique of this case see Reeves, *The Act of State—Foreign Decisions Cited in the Sabbatino Case, supra.*

Department disagreed, insisting on compensation only. Thus, Under-Secretary of State Welles said:

> ". . . the course pursued by Great Britain had been diverted very largely to an arbitration of her position that the properties should be immediately restored to the owners, whereas the United States . . . never questioned the legal right of the Mexican government to expropriate properties within its jurisdiction," [1940] 5 For. Rel. U.S. 995.

The United States took the same position in the *General Aniline & Film* dispute, conceding that "the disposition of title to property located within a country . . . is within the domestic jurisdiction of that country", Jacoby, *Toward a Rule of Law*, 52 Amer. J. Int. L. 107, 109-10 [1957].

The attitude of the State Department toward the Cuban expropriations is reflected in the Memorandum submitted by the State and Justice Departments to the Supreme Court in *Rich* v. *Naviera Vacuba, S.A., supra,* in which the Department said:

> "1. Petitioner, in effect, seeks redress in this proceeding for the expropriation of its property allegedly owned by it in Cuba. But no such redress is available here. It may be assumed that the confiscation is unlawful under international law, *i.e.,* so far as relations between the Governments of the United States and Cuba are concerned. But that does not mean that Cuba, as between itself and petitioner, does not have valid title to the expropriated property so far as our courts are concerned." (Memorandum of Solicitor General to Supreme Court on application by United Fruit Co. for stay, *Rich* v. *Naviera Vacuba, supra,* at p. 2).

There is a time-honored method for handling disputes of this sort. As this Court said in *Shapleigh* v. *Mier,* 299 U.S. 468 at 471:

> "For wrongs of that order the remedy to be followed is along the channels of diplomacy."

See also *United States* v. *Diekelman*, 92 U.S. 520, 524; *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310.

The State Department on March 1, 1961, issued a memorandum setting forth the views of the Department concerning claims based on the Cuban expropriations. The Department indicated that in the past it had settled similar problems by submitting individual claims through diplomatic channels by obtaining a lump sum settlement or by agreement submitting all claims to an international tribunal for arbitration. Nowhere was it suggested that relief could be obtained through judicial process even assuming a violation of international law by the Cuban Government. The memorandum is set forth in Kerley, *Contemporary Practice of the United States Relating to International Law*, 56 Amer. J. Int. L. 165, 166 (1962).

Congress, in enacting the Hickenlooper amendment and those who sponsored the amendment before the committees which considered it, professed to be much concerned with adhering to the principles of international law. Those principles do not permit the remedy which the Court of Appeals has fashioned in this case.

CONCLUSION

The decision and judgment of the Court of Appeals should be reversed.

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner.

December 27, 1967.

APPENDIX A

". . . Domestic court judgments to the effect that a foreign government has violated international law in nationalizing property which might cut off any possibility of fruitful negotiation. A judgment the other way would weaken the negotiator's hand fatally.

While the Sabbatino Amendment seems to have been prompted by the nationalization program carried out by the Castro Government in Cuba, it is well to remember that the reach of the Amendment and the scope of the problem we are looking at here are by no means confined to Cuba. Indeed, now that the nationalizations in Cuba have been completed, the problem is largely one that relates to parts of the world other than Cuba.

We should look at the prospects for coping with official measures taken against American property in many countries around the world. Not infrequently, initial steps by a foreign government to nationalize or interfere with American enterprises and property are followed by negotiations in which a settlement is worked out substantially protecting the American interests.

As you know, in Brazil there has been a change of government in the last year, and several large investors—including, for example, the Texas Company whose spokesman, Mr. Olmstead, appeared here yesterday as a principal advocate of the Sabbatino Amendment—have been able with the help of the United States Government to work out generally satisfactory settlements with the Brazilian authorities. In Argentina, the situation concerning the oil company contracts purportedly annulled by the Argentine Government in 1963 remains under negotiation.

If lawsuits had been brought in the United States to adjudicate the legality of nationalization actions by the Brazilian and Argentine Governments, it seems very clear to us that an examination of foreign governments' actions by an American court would only have harmed and might

permanently have precluded the possibility of a reasonable negotiated settlement.

It has been urged, in support of the Sabbatino Amendment, that untoward foreign policy consequences are guarded against by the provision enabling the President to invoke the Act of State Doctrine in a particular judicial case. In our view, this intended safeguard is not effective. In several respects, the Amendment would deprive the President of needed flexibility in the conduct of foreign relations. There is, for example, a question whether the President could invoke the Act of State Doctrine at any time after the initial stage of a lawsuit; under the Amendment, he might have to file a suggestion then or never. As a practical matter, the President would be deprived of negotiating flexibility in any case where a suggestion was not filed; and we cannot suppose the Amendment contemplates affirmative action to invoke the Act of State Doctrine in each and every case."

OPINIONS AND JUDGMENTS OF COURTS BELOW

Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 59—September Term, 1966.

(Argued November 14, 1966 Decided July 31, 1967.)

Docket No. 30341

BANCO NACIONAL DE CUBA,
Plaintiff-Appellant,

v.

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.,
Defendants and 3rd Party Plaintiffs-Appellees,

v.

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS,
3rd Party Defendants-Appellees.

Before:

WATERMAN, MOORE and HAYS,
Circuit Judges.

Opinion of United States Court of Appeals, For the Second Circuit

Appeal from a judgment of the United States District Court for the Southern District of New York, BRYAN, *J.*, granting a motion by defendants, Farr, Whitlock & Co., for a summary judgment dismissing plaintiff-appellant's complaint. The court handed down two opinions, the first, of July 30, 1965 is found at 243 F. Supp. 957, the second, of November 16, 1965 is as yet unreported.

The dismissal of the complaint is affirmed.

Defendants had impleaded as third-party defendants Compania Azucarera Vertientes-Camaguey de Cuba and Lehman Brothers, and when appellant's complaint was dismissed defendants' third-party complaint was also dismissed, and *this dismissal order is also affirmed.*

The American Bar Association was granted leave to file a brief *amicus curiae* and did so in support of the judgment orders below.

VICTOR RABINOWITZ, Leonard B. Boudin, Rabinowitz & Boudin (Kent Spriggs, on the brief), New York City, *for Plaintiff-Appellant.*

C. DICKERMAN WILLIAMS, Harold d'O. Baker, Baker, Nelson, Williams & Mitchell, New York City, *for Defendants and Third Party Plaintiffs-Appellees.*

WHITNEY NORTH SEYMOUR, SR., Eastman Birkett, John A. Guzzetta, Gerald M. Levin, Simpson, Thacher & Bartlett, New York City, *for Third-Party Defendants-Appellees.*

min Busch, *for Amicus Curiae.*

ARTHUR H. DEAN, Erwin N. Griswold, Max Chopnick, C. W. Haight, Doris Carroll, Benja-

Opinion of United States Court of Appeals, For the Second Circuit

WATERMAN, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York dismissing the appellant's complaint and the defendant's complaint against impleaded third parties. This litigation has been the subject of three much-discussed previous opinions. In the original hearing of the action before the district court summary judgment was granted in favor of the defendants, 193 F. Supp. 375 (1961). This disposition was affirmed by this court (307 F. 2d 845 (1962), but reversed by the Supreme Court, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964). The facts have been fully stated in these opinions, see *e.g.*, the opinion of Mr. Justice Harlan for the Court, 376 U. S. 398 at 401-408. On remand the district court has again ruled in favor of the defendants in an opinion reported at 243 F. Supp. 957 (July 30, 1965), later supplemented by an unreported opinion of November 16, 1965 at the time judgment was entered.

This action, which has served as the test case [1] for litigation concerning Cuban expropriations, involves the disposition of the proceeds of the sale of a cargo of sugar which was expropriated by the Castro government while the cargo was in Cuban territorial waters.

During February and July of 1960 appellee Farr, Whitlock & Co. (a copartnership hereinafter referred to as Farr, Whitlock) an American commodity broker, contracted with a wholly-owned Cuban subsidiary of appellee Compania Azucarera Vertientes-Camaguey de Cuba (C. A. V.) for the purchase of Cuban sugar. The sugar was to be delivered free alongside the steamer in Cuba and payment was to be made in New York by Farr, Whitlock upon presentation of shipping documents and a sight draft.

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[1] It is stated in the district court's opinion that thirty-five cases involving a wide spectrum of questions arising out of Cuban expropriations" remain before the court below awaiting the final determination of this case. 243 F. Supp. 957, 962 (1965).

Pursuant to the contracts, 22,000 bags of sugar were loaded on board the German vessel S.S. Hornfels which was standing offshore at the Cuban port of Jucaro. The loading took place between August 6 and August 9, 1960. On August 6, 1960 the Cuban government passed a resolution [2] providing for the compulsory expropriation of all property located within Cuban territory of appellee C. A. V., a corporation organized under Cuban law but owned to the extent of more than ninety per cent of its capital stock by residents of the United States. As a result of the

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[2] The resolution, which was promulgated by the Cuban President and Prime Minister provides:

> WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America, of continued aggression for political purposes, against the basic interests of the Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country, whereby exceptional powers were conferred upon the President of said nation to reduce the participation of Cuban sugars in the sugar market of said country, as a weapon of political action against Cuba, was considered as the fundamental justification of said law.
>
> WHEREAS, the Chief Executive of the Government of the United States of North America, making use of said exceptional powers, and assuming an obvious attitude of economic and political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process.
>
> WHEREAS, this action constitutes a reiteration of the continued conduct of the government of the United States of North America, intended to prevent the exercise of its sovereignty and its integral development by our people thereby serving the base interests of the North American trusts, which have hindered the growth of our economy and the consolidation of our political freedom.
>
> * * * * *
>
> WHEREAS, it is the duty of the peoples of Latin America to strive for the recovery of their native wealth by wrestling it from

resolution the consent of the Cuban government was necessary before the S.S. Hornfels was allowed to sail from Cuban waters. This consent was obtained on August 11 when Farr, Whitlock entered into contracts identical to its prior contracts with the subsidiary of C. A. V. with Banco Para el Commercio Exterior de Cuba (Banco Exterior), an instrumentality of the Cuban government. On August 12 the S.S. Hornfels sailed to Morocco with its cargo of sugar.

Banco Exterior assigned the bills of lading to appellant Banco Nacional de Cuba (Banco Nacional), the financial agent of the Cuban government. Banco Nacional sent them to Societe Generale, a French bank which acted as its New York agent, for presentation to Farr, Whitlock in New York. Farr, Whitlock gained possession of the bills of lading on August 29, 1960 without making payment upon presentation. The funds were claimed from Farr, Whit-

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the hands of the foreign monopolies and interests which prevent their development, promote political interference, and impair the sovereignty of the underdeveloped countries of America.

* * * * *

NOW, THEREFORE: In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby

RESOLVE:

FIRST. To order the nationalization, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest, as listed below, to wit:

* * *

22. Compania Azucarera Vertientes Camaguey de Cuba.

* * *

lock on behalf of C. A. V.,[3] and Farr, Whitlock for this reason refused to make payment to Societe Generale or to return the bills of lading.

The present action was commenced by Banco Nacional in the United States District Court for the Southern District of New York on October 10, 1960, alleging that Farr, Whitlock had converted the bills of lading by its refusal to return them or to pay over their proceeds to Societe Generale. On October 24, 1960, pursuant to an order of the New York Supreme Court, Kings County, Farr, Whitlock transferred the proceeds of the bills of lading, a total of $173,936.31, to a New York court appointed Temporary Receiver, Sabbatino. The complaint in the present action was amended on October 31, 1960 to include Sabbatino as a defendant.

On March 31, 1961 the district court, acting on various motions of the parties before it, held that it had jurisdiction over the subject matter of the action despite state court control of the funds at issue. It granted summary judgment for the defendants, holding that the taking of the sugar by the Cuban government violated international law in three respects: it was motivated by a retaliatory purpose, not a legitimate public purpose; it discriminated against nationals of the United States; and it failed to provide adequate compensation for the property taken; and inasmuch as the taking violated international law, Cuba did not acquire good title to the sugar upon which to base its claim of conversion.

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[3] Farr, Whitlock received notice on August 23, 1960 that Peter L. F. Sabbatino on August 16 had been appointed Temporary Receiver for the assets of C. A. V. within New York State pursuant to N. Y. Civ. Pract. Act, § 977-b.

On August 26th Farr, Whitlock was notified by officers of C. A. V. that C. A. V., not the Cuban government, was the rightful owner of the sugar covered by the bills of lading which Societe Generale held. Farr, Whitlock and C. A. V. entered into an agreement on that day

We affirmed this judgment on July 6, 1962, holding that the failure of the Cuban government to pay adequate compensation to C. A. V. for the taking of its property, combined with the evident retaliatory purpose and the discriminatory effect of the taking upon the rights of American nationals, constituted a violation of international law. We rejected, just as the district court had previously rejected, the appellant's contention that the act of state doctrine applied to this case; and we based in part our conclusion on two letters written by State Department officers evidencing the fact that the Executive Branch had no objection to a judicial determination of the merits of the controversy.

The Supreme Court granted certiorari, 372 U. S. 905 (1963), and reversed us on March 23, 1964. The Court held that the act of state doctrine did apply to this case, and therefore the courts of the United States were prevented from examining the validity of the acts of the Cuban government under international law "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles. . . ." 376 U. S. at 428. The Court declared that the act of state doctrine had " 'constitutional' underpinnings" arising out of the "basic relationships between branches of government in a system of separation of powers." 376 U. S. at 423.[4] The Court did

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that Farr, Whitlock would retain th e proceeds of the sugar shipments unless compelled to turn them over by court order. In return for this, C. A. V. would indemnify Farr, Whitlock against any claims and defend any suits against Farr, Whitlock for the sugar or the proceeds therefrom. In addition C. A. V. promised to pay Farr, Whitlock ten per cent of the proceeds if C. A. V. were ultimately successful in obtaining them.

[4] Our view that the two letters written by State Department officers indicated that the Executive Branch had no objection to a judicial determination as to the validity of Cuba's actions under international law proved erroneous when the Executive Branch formally filed an *amicus* brief in the Supreme Court on the side of Banco Nacional and participated in the oral argument before the Court.

not reach the issue of whether the taking in this case violated international law. See 376 U. S. at 433. It remanded the case to the district court to hear and decide any litigable issues of fact which might develop and for "proceedings consistent with this opinion." 376 U. S. at 439.

On March 28, 1963, one year before the decision of the Supreme Court was handed down, Banco Nacional, Farr, Whitlock, C. A. V., and Sabbatino agreed that Lehman Brothers would hold a sum of money in escrow to satisfy the final judgment in this case, and Sabbatino transferred $225,000 to Lehman Brothers for this purpose. The agreement also provided that C. A. V. would indemnify Farr, Whitlock for any excess of any judgment against it over the amount in the escrow fund. Thereafter the New York state Temporary Receivership was terminated by order of the New York Supreme Court and Sabbatino was eliminated as a party to this case by a stipulation of the parties.

After this case was remanded to the district court appellant moved for final judgment in its favor but judgment was not entered due to a miscellany of complications, see 243 F. Supp. 957, at 961-62, and while the proceedings relative to the entry of judgment on remand were pending the Hickenlooper Amendment[5] was enacted into law on October 7, 1964. It provided:

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[5] The Hickenlooper Amendment, which has also been referred to elsewhere as the Sabbatino Amendment or the Rule of Law Amendment, was attached to the Foreign Assistance Act of 1964 and became Section 301(d)(4) of that act. (Pub. L. 88-633, 78 Stat. 1009, 1013.)

The Amendment was reenacted in 1965 when the next Congress adopted the Foreign Assistance Act of 1965 (Pub. L. 89-171, 79 Stat. 653) which became law on September 6, 1965. The enactment contained a slightly different version of the Hickenlooper Amendment, and is found in Section 301(d)(2) of that Public Law. Incorporated into the U. S. Code it is found at 22 U. S. C. § 2370(e)(2). The only change was the substitution of "other right to property" for "other right" in two instances, and the deletion of Proviso 3, which

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966.

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had formerly made the Amendment inapplicable to any case in which the proceedings had not been commenced before January 1, 1966.

These changes in no way affect the case before us, and when we have discussed the Amendment throughout our opinion we have made no attempt to differentiate the Amendment in effect from October 7, 1964 from the Amendment in effect from September 6, 1965 to date. The Amendment, as first adopted, appears here in the text, the re-enacted version is incorporated into footnote 20. It is interesting to note that these language changes became law during the 60 day period when the court below was awaiting word from the Executive before ordering the entry of judgment. See footnote 1 in Judge Bryan's as yet unreported supplemental opinion.

On November 12, 1964 an order was entered impleading C. A. V.[6] and Lehman Brothers as third-party defendants pursuant to Fed. R. Civ. P. 14.

Defendant Farr, Whitlock and the third-party defendants moved for summary judgment dismissing the complaint, based on the Hickenlooper Amendment. On July 30, 1965 the district court granted these motions, withholding final judgment for sixty days to allow the President to exercise his rights under the second proviso of the Amendment. Final judgment was entered on November 17, 1965 after the Court was notified that the Executive Branch did not intend to intervene and to suggest application of the act of state doctrine in this case.[7]

The district court in a scholarly and well-reasoned opinion held that the Hickenlooper Amendment applied to the case at bar, that the Amendment was constitutional, and that it was bound by our prior determination, 307 F. 2d 845 (1962), that the expropriation by the Cuban government violated international law. The same issues are

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[6] C. A. V. moved before the Supreme Court to be substituted as a party for Sabbatino but the motion was denied without prejudice to its renewal in the lower courts. 376 U. S. at 407-08. C. A. V. submitted a brief and made oral argument before the Supreme Court as *amicus curiae*.

[7] The court received a letter from the United States Attorney for the Southern District of New York dated September 29, 1965 which reads:

> In its decision of July 30, 1965 this Court afforded the Executive Branch the opportunity to file a suggestion indicating whether the application of the act of state doctrine is required by the foreign policy interests of the United States, as provided for in Section 620(e)(2) of the Foreign Assistance Act of 1961, as amended (22 U. S. C. 2370(e)(2). I am instructed to inform the Court that no determination has been made that application of the act of state doctrine is required in this case by the foreign policy interests of the United States.
>
> So that there will be no ambiguity, the Court is advised that no such determination is contemplated.

raised before us, and in disposing of them we reach the same result the lower court reached, adopting as our own much of the discussion and points made by the learned judge below.

I. *The Applicability of the Hickenlooper Amendment*

Appellant first claims that the Hickenlooper Amendment was not intended to apply to "transactions" completed before the date of its enactment. If this is so and the expropriation here is a "transaction" the present case would be excluded from the effect of the amendment, for the expropriation in this case occurred on August 6, 1960, and the Amendment was not enacted until October 7, 1964.

In interpreting a statutory provision, we first direct our attention to the applicable words in the statute in order to analyze the meaning and effect of those words in relation to the subject matter treated. The words of the Amendment which deal with the expropriations it is intended to apply to are:

> . . . a case in which a claim of title or other right to property is asserted by . . . a foreign state (or a party claiming through such state) based upon . . . a confiscation or other taking after January 1, 1959. . . .

The case before us would seem to fall within the above statutory language. Here a claim of title is being asserted by a party claiming through a foreign state based upon a taking after January 1, 1958.[8] It may be noted that the statute refers specifically to a "case," not to a mere claim

[8] Appellant claims that January 1, 1959, the date on which the Castro government took office in Cuba is "more symbolic than significant."

Even if this is true we cannot see how it makes any difference in the face of the express inclusion of that date in the statute. Nor is the fact that the first expropriations after that date occurred in Brazil, not Cuba, of any relevance.

or cause of action which had not been the subject of court action prior to the enactment of the statute. This use of "case" indicates that Congress meant to affect the result of pending litigation as well as to affect a more nebulous group of unlitigated claims. Moreover, it is well established that when a statute specifically applies to past transactions, as the Hickenlooper Amendment does, it applies to pending cases too, because a case must be decided according to the law as it exists at the time of final judgment. See, e.g., *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964); *United States* v. *Alabama,* 362 U. S. 602 (1960) (*per curiam*); *Hines* v. *Davidowitz,* 312 U. S. 52 (1941); *Carpenter* v. *Wabash Ry.,* 309 U. S. 23 (1940); *Dinsmore* v. *Southern Express Co.,* 183 U. S. 115 (1901); *United States* v. *Schooner Peggy,* 5 U. S. (1 Cranch) 103, 109 (1801) (Marshall, *Ch. J.*), *cf. Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538 (1941). It is true, as appellant points out, that these cited cases differ from the present case in some particulars; one is a criminal case, others involve whether injunctive relief should be granted or denied, and others involve the effect of a new treaty or a change in the case law; and none involve the effect of a new statute. In total, however, they lay down a rule both reasonable and just and appellant gives no convincing reason why the rule should not be applied in this case where a statute has become law while the case has been pending.

Appellant argues that in the absence of a clear indication that retroactive application is intended here there is a presumption that a statute is intended to operate prospectively only. This proposition is well supported by authority, but there is no ambiguity in the Hickenlooper Amendment that would permit the presumption to be operative for in the language of the Amendment which we have discussed above there is a clear expression of a legislative intention that it is to be applied retroactively. That the statute, enact in 1964, applies to takings effected after

January 1, 1959, is a clear indication that retroactivity was intended.

The legislative history of a statute is useful when the meaning of the statute is not apparent from the language. Though, as we have said, we have had no difficulty in ascertaining that the Hickenlooper Amendment applies to a case based on a taking after January 1, 1959, we will nevertheless examine the legislative history of the amendment to consider whether it provides any basis for appellant's contention that it was not intended to apply to cases pending at the time of its enactment.

During the spring and summer of 1964 Congress was considering amendments to the basic Foreign Assistance Act. The House passed a version of the Foreign Assistance Act of 1964 and sent it to the Senate where it was referred to the Committee on Foreign Relations. At this point Senator Hickenlooper proposed the amendment in issue here and it was included in the version of the Act reported to the Senate in essentially the same form as it is now, except that the 1964 version applied only to cases commenced before January 1, 1966. The Senate Report stated:

> The amendment is intended to reverse in part the recent decision of the Supreme Court in *Banco de Nacional de Cuba* v. *Sabbatino*. The act of state doctrine has been applied by U. S. courts to determine that the actions of a foreign sovereign cannot be challenged in private litigation. The Supreme Court extended this doctrine in the *Sabbatino* decision so as to preclude U. S. courts from inquiring into acts of foreign states, even though these acts had been denounced by the State Department as contrary to international law.
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> In the *Sabbatino* case, the Banco Nacional de Cuba sued to recover the proceeds of a sale of Cuban sugar by an American-owned company on the ground that the sugar, which had been expropriated, be-

longed to the Cuban Government. The lower courts dismissed the suit, but the Supreme Court reversed these decisions and remanded the case for further proceedings on the ground that it would not inquire into the act of the Cuban State.

* * *

The effect of the amendment is to achieve a reversal of presumptions. Under the *Sabbatino* decision, the the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.[9]

The bill, including the amendment, was then passed by the Senate and sent to a conference committee. The conference report explains several of the provisions which appear in the final version of the amendment before us:

The managers on the part of the House regretted that there had not been an opportunity for thorough study and full hearings on the subject. The committee of conference amended the Senate language to pinpoint its precise effect, making it clear that it does not apply if no violation of international law principles is found, or if the case involves a short term irrevocable letter of credit issued in good faith prior to the taking of property by a foreign state. The exception in those individual cases in which the President determines that judicial review of the foreign government's action is not in the U. S. foreign policy

[9] S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. 24 (1964).

> interest is preserved. An additional change was added to limit the application of the amendment to cases in which the proceedings are commenced before January 1, 1966. This limitation was approved with the understanding that the congressional committees concerned will make a full review and study of the matter during the next Congress and make a determination on the need for permanent legislation.[10]

As stated before, the amendment was enacted into law on October 7, 1964.

Further amendments to the Foreign Assistance Act were considered and enacted by the next session of Congress, among them an amendment (see footnotes 5 and 20) which eliminated the third proviso from the Hickenlooper Amendment and made it permanent legislation, applicable to all future expropriations. The Senate Report on this bill contained the statement:

> *The existing law applies to cases pending at the time of its enactment* or brought since then in which "a claim of title or other right" is asserted based upon a confiscation or other taking after January 1, 1959, by an act of a foreign state in violation of the principles of international law. (Emphasis supplied.) [11]

It should be noted that the above statement was made at a subsequent session of Congress but it was made before the decision of the court below in this case.[12] Such pronouncements by a subsequent Congress are not entitled to the same weight as those of the Congress which enacted a measure, see, e.g., *United States* v. *Price*, 361 U. S. 304

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[10] H. R. Rep. No. 1925, 88th Cong., 2d Sess. (1964).

[11] S. Rep. No. 170, 89th Cong., 1st Sess. 19 (1965).

[12] S. Rep. No. 170 was filed on April 28, 1965; the opinion below was not filed until July 30, 1965.

(1960); *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84 (1958); cf. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 281-82 (1947), but they are useful when one attempts to determine the intention of the earlier Congress. *Federal Housing Administration* v. *Darlington, Inc., supra.*

In addition to these committee reports the parties have referred us to remarks of Senator Hickenlooper made during the debates on the Senate floor over the Foreign Assistance Acts of 1964 and 1965. While statements made during floor debates are not entitled to the same respect as carefully prepared committee reports, see *United States* v. *International Union (UAW-CIO)*, 352 U. S. 567, 585-86 (1957), these statements made by the original proponent of the Amendment are of some significance, see *United States* v. *International Union (UAW-CIO), supra;* cf. *Chicago, M., St. P. & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U. S. 465 (1949).

On August 14, 1964 Senator Hickenlooper made several statements on the Senate floor and submitted memoranda supporting the Amendment which were included in the Congressional Record.

At one point he said: "Basically the amendment is designed to assure that the private litigant is granted his day in court." 110 Cong. Rec. 18936 (1964). If this statement by the Amendment's sponsor states the amendment's purpose there would seem to be no justification for a restrictive interpretation of the statutory language limiting its application to future litigants; the statement refers to and includes any and all private litigants, it neither specifically includes or excludes litigants whose cases were pending in 1964 when the statement was made.

Later in the debate the Senator expanded on the purpose of the Amendment and what its effect would be:

> This amendment is an exercise of our broad powers with respect to foreign commerce and investment

and will restore the rule in our courts that acts of a foreign state are subject to international law. This supplement to section 620(e) of the Aid Act will discourage foreign expropriation by making sure that the United States cannot become a "thieves market" for the product of foreign expropriations.

* * *

One of the principal reasons for the proposed amendment is that it will serve notice that foreign states taking action against U. S. investment in violation of international law cannot market the product of their expropriation in the United States free from the risk of litigation. Thus, the amendment itself will do much to deter illegal takings and thereby exert a positive influence to avoid the embarrassment to U. S. foreign policy interests caused by such takings. 110 Cong. Rec. 19555, 19559 (1964).

Appellant argues that this indication that the Amendment was designed to have a deterrent effect upon future expropriations means that it was not intended to apply to pending cases because application to these cases would not have any deterrent effect on the future actions of foreign governments. It claims that Congress intended that the rights of these litigants would be restricted to those granted in the Cuban Claims Act, 22 U. S. C. §§ 1643-43k. That Act, however, contained no language indicating that persons claiming under the Hickenlooper Amendment were to be so affected. See 110 Cong. Rec. 22852 (1964) (Statement of Rep. Fascell, sponsor of the bill). Nor is there any reason to believe that, although the Hickenlooper Amendment also had the purpose of preventing the United States from becoming a "thieves market," it was not enacted "basically . . . to assure that the private litigant is granted his day in court," 110 Cong. Record 18936 (1964), and that

this assurance was intended to include contemporaneous litigants as well as future litigants.

The only persuasive piece of legislative history cited by appellants in support of their position is taken from one of the memoranda submitted to the Senate by Senator Hickenlooper. The memorandum reads in part:

> 2. Question: "Does the proposed amendment overrule a decision of the Supreme Court?"
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> Answer: "The amendment will lead U. S. courts to a different result from that reached by the majority in the recent Supreme Court decision in *Banco Nacional de Cuba* v. *Sabbatino*. *It does not change the Court's decision in that case.* Rather, the amendment clarifies public policy applicable to such cases pursuant to Congress [sic] constitutional power to legislate concerning the aid program, foreign commerce, and offenses against international law . . ." 110 Cong. Rec. 19557 (1964). (Emphasis supplied.)

This one brief statement tends to support both appellant's position that the Amendment was not intended to apply generally to pending cases, and appellant's position, to be discussed further, *infra*, that even if the Amendment was intended to apply to other pending cases, it was not intended to apply to this particular case. This was an isolated statement which ordinarily would be accorded but little weight. See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 396 (1951); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318 (1897); *Nicholas* v. *Denver & R. G. W. R.R.*, 195 F. 2d 428, 431 (10 Cir. 1952). But, of course, the statement was made by Senator Hickenlooper and would be of some moment except for the fact that a different statement made by Senator Hickenlooper in a letter to the Washington Post was printed in

the Congressional Record on the same day. This other statement read:

> It should be noted that the amendment is not intended to reinstate the broad holding established in the trial court. *It only modifies the Supreme Court decision in the matter of presumptions.* We think it perfectly proper that the Congress of the United States should have the last word on this important policy question. 110 Cong. Rec. 18936 (1964). (Emphasis supplied.)

The last citation to the congressional debate is given to us by appellee C. A. V. It was made by Senator Hickenlooper during the debate on the Foreign Assistance Act of 1965 and is subject to the same reservations as the committee report on that Act that we have cited *supra,* it having been said during a subsequent session of Congress. The Senator at that time stated unequivocally: "The Amendment applies to any case pending at the time of its original enactment (Oct. 7, 1964) or brought since then, involving takings since January 1, 1959 . . ." 111 Cong. Rec. 13544 (1965).

In summary, the legislative history provides some support for both parties on the issue of whether the Hickenlooper Amendment was intended to apply to pending cases, but obviously it is stronger in favor of their inclusion. Certainly this legislative history contains nothing which would make us doubt our conclusion based upon the unambiguous words of the statute that the language of the Amendment demonstrates that the statute was intended to apply to cases pending at the time of its enactment as well as to cases which might subsequently be instituted.

As mentioned above, appellant also contends that even if the Hickenlooper Amendment applies generally to all other cases pending at the time of its enactment, it should not apply to this case. It cites the statement of Senator

Hickenlooper, quoted *supra*, that the Amendment was not intended to change the Court's decision in *Sabbatino*. As our earlier discussion of that quotation indicates, that statement, standing alone, cannot be considered to represent the intention of Congress, especially when, as we have noted earlier, the Senator on the very same day published a contradictory statement. In our view, this case before us on appeal falls within the actual language of the Amendment just as precisely as the other pending cases do, and this isolated bit of legislative history, the only one supporting appellant's position, is not enough to indicate a congressional intention to treat this case differently from the other cases.

Appellant also contends that the Amendment may not be applied to this case because to do so would violate the mandate of the Supreme Court. It claims that all litigable issues have already been decided by the nation's highest court, and, these issues having been so decided, the inferior courts are bound thereby despite any intervening event, even the passage of congressional legislation in the area.

Since *Ex Parte Sibbald* v. *United States*, 37 U. S. (12 Pet.) 488 (1838) the Supreme Court has consistently held that a lower court with jurisdiction over a case on remand under a Supreme Court mandate is foreclosed from reconsidering matters decided by the Supreme Court. E.g., *United States* v. *Haley*, 371 U. S. 18 (1962); *United States* v. *Parke, Davis & Co.*, 365 U. S. 125 (1961); *Briggs* v. *Pennsylvania R.R.*, 334 U. S. 304 (1948); *In re Washington & G. R.R.*, 140 U. S. 91 (1891); *Tyler* v. *Magwire*, 84 U. S. (17 Wall.) 253 (1872); *Ex Parte Dubuque & Pac. R.R.*, 68 U. S. (1 Wall.) 69 (1863). The rule prevents the lower court from considering newly discovered evidence, *In re Potts*, 166 U. S. 263 (1897); *Mackall* v. *Richards*, 116 U. S. 45 (1885); *Southard* v. *Russell*, 57 U. S. (16 How.) 547 (1853) or reconsidering its own jurisdiction, *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31 (1893);

Skillern's Ex'rs. v. *May's Ex'rs.*, 10 U. S. (6 Cranch) 267 (1810). The rule has even been applied despite the claim that a later Supreme Court decision required a different result. *Gaines* v. *Rugg*, 148 U. S. 228 (1893). Of course it does not apply to matters left open by the mandate, e.g., *Sprague* v. *Ticonic Nat'l Bank*, 307 U. S. 161 (1939); *Ex Parte Union Steamboat Co.*, 178 U. S. 317 (1900); *In re Sanford Fork & Tool Co.*, 160 U. S. 247 (1895),[13] or when the mandate has been amended to permit the lower court to consider a question. See *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446, 477 (1948); *149 Madison Ave. Corp.* v. *Asselta*, 331 U. S. 795 (1947); *Alaska Juneau Gold Mining Co.* v. *Robertson*, 331 U. S. 793 (1947).[14]

We have learned of no case involving the effect on the rights of litigants of a federal statute, inconsistent with a Supreme Court mandate, which became law after the Supreme Court had remanded a case to the trial court but before the trial court had acted upon the merits after the remand. None has been called to our attention by the parties and we have found none by independent research. We must therefore determine whether the mandate rule should cover this novel situation; it is our view that it should not be extended to do so.

The Supreme Court mandate rule is nothing more than one specific application of a general doctrine appellate courts apply to their orders to lower courts, a doctrine commonly referred to as the law of the case, see *Briggs* v. *Pennsylvania R.R.*, 334 U. S. 304, 306 (1948); *Ex Parte Sibbald* 1. *United States*, 37 U. S. (12 Pet.) 488, 492 (1838).

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[13] In view of our conclusion as to the applicability of the mandate rule, we need not decide whether the terms of the mandate in this case would allow the court below to consider the applicability of the Hickenlooper Amendment. See 243 F. Supp. at 971.

[14] We do not find it necessary to consider whether it is too late for the Supreme Court to amend its mandate. See 243 F. Supp. at 971, n. 7.

Other courts in applying the law of the case rule have held that a lower court is not bound to follow the mandate of an appellate court if the mandate is, in the interim, affected by an authority superior to the court issuing the mandate, such as by a higher appellate court, either state or federal, see, e.g., *Higgins* v. *California Prune & Apricot Grower, Inc.*, 3 F. 2d 896 (2 Cir. 1924); *Zerulla* v. *Supreme Lodge O. of M. P.*, 223 Ill. 518, 79 N. E. 160 (1906); *Jones* v. *Harmon*, 122 Ohio St. 420, 172 N. E. 151 (1930); *American R. Exp. Co.* v. *Davis*, 158 Ark. 493, 250 S. W. 540 (1923); *Orleans Dredging Co.* v. *Frazie*, 177 Miss. 188, 173 So. 431 (1937) or by an *en banc* decision of the same court, *Poe* v. *Illinois Cent. R.R.*, 339 Mo. 1025, 99 S. W. 2d 82 (1936). This principle has also been applied when the mandate of the court is affected by intervening statutory enactment, *Petty* v. *Clark*, 113 Utah 205, 192 P. 2d 589 (1948); *Donaldson* v. *Chase Securities Corp.*, 216 Minn. 269, 13 N. W. 2d 1 (1943), *aff'd*, 325 U. S. 304 (1945); cf. *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033 (1901); *Albanese* v. *McGoldrick*, 129 N. Y. S. 2d 269 (Sup. Ct. 1954). The same principle should apply here; any limiting language in the Supreme Court mandate should not preclude judicial application of the Amendment in this case for the rule of law expressed by the mandate has been affected by a subsequently enacted federal statute.

Moreover, as the court below may have indicated, 243 F. Supp. at 971, there may well be a constitutional objection to an application of the mandate here. The law of the case is not based on any constitutional authority but is only a doctrine of judicial administration based on the practice of the courts, *Messenger* v. *Anderson*, 225 U. S. 436 (1912); *King* v. *West Virginia*, 216 U. S. 92, 100 (1910). A federal statute, on the other hand, is an assertion of its constitutional power by Congress and is entitled to respect as the

supreme law of the land. U. S. Const. art. VI, cl. 2. It is questionable whether the courts may frustrate such a statute by interposing a judge-made rule of practice.

Thus we hold that Congress intended that the Hickenlooper Amendment should apply to cases pending at the time of its enactment, including this case.

II. *Constitutionality of the Hickenlooper Amendment*

Appellant next contends that the Hickenlooper Amendment is unconstitutional both as a general proposition and also as applied to this case and other pending cases. Three basic arguments against the constitutionality of the Amendment are advanced; we shall treat them in turn.

A. *Due Process.*

Appellant contends that the application of the Hickenlooper Amendment to this case constitutes a deprivation of property in violation of the due process clause of the Fifth Amendment.[15]

Appellant would have us characterize the act of state doctrine as a "substantive" right which is constitutionally protected. It would distinguish the cases cited below in which courts had found no constitutional violation as being cases dealing only with "remedial" or "procedural" matters and not with "substantive property rights." We do not find it useful to make an arbitrary division of the cases under these labels whose meanings are not only uncertain

[15] We note with interest the district court's statement that there is "serious doubt" whether appellant, an instrumentality of a foreign government, should be considered a "person" within the meaning of the Fifth Amendment, 243 F. Supp. at 977. But cf. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931). However, we do not find it necessary to determine this issue because we think it clear that application of the Hickenlooper Amendment to this case does not violate the due proces clause.

but may vary according to the context in which they are being discussed.

We have examined the cases cited by appellant as supporting its position, such as *Lynch* v. *United States,* 292 U. S. 571 (1934); *Forbes Pioneer Boat Line* v. *Board of Comm'rs,* 258 U. S. 338 (1922); *Levy* v. *Wardwell,* 258 U. S. 542 (1922); *Noble* v. *Union River Logging R.R.,* 147 U. S. 165 (1893); *Society for the Propagation of the Gospel* v. *Wheeler,* 22 Fed. Cas. 756 (No. 13,156) (C. C. D. N. H. 1814). We find that they all involve the destruction of property to which the owner could claim a "vested right," see *Campbell* v *Holt,* 115 U. S. 620, 628 (1885); *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 302 (1937), or involve retroactive application of statutes that created new liabilities.

Appellant's situation is readily distinguishable from these cases. The Supreme Court's determination in appellant's favor is based not on any recognition that appellant acquired enforceable rights through the Cuban expropriation, but upon a judicial policy of abstaining from an affirmative determination as to those rights, an abstention held applicable to this case long after the expropriation. The Hickenlooper Amendment thus does not affect appellant's property rights based upon the expropriation nor create any new rights or any new liabilities, see *Swayne & Holt, Ltd.* v. *United States, supra.* The application of the act of state doctrine in appellant's favor was without regard to the merits of appellant's claim that its property had been tortiously appropriated by appellee. Its effect in this litigation has been similar to that of a successfully pleaded statute of limitations by which a defendant obtains a judgment without the merits of plaintiff's action ever having been reached. Continuing this analogy, it is well established that modification of statutes of limitation does not create or destroy constitutionally protected prop-

erty rights in those affected by the changes. *Chase Sec. Corp.* v. *Donaldson*, 325 U. S. 304 (1945); *Campbell* v. *Holt*, 115 U. S. 620 (1885); see *Graham & Foster* v. *Goodcell*, 282 U. S. 409 (1931); cf. *Swayne & Holt, Ltd.* v. *United States*, 300 U. S. 297 (1937).

Appellant's situation is like this latter group of cases and therefore we hold that the application of the Hickenlooper Amendment to this case does not deprive appellant of its property without due process of law under the Fifth Amendment.

B. *Legislative Interference with the Judicial Power.*

Appellant also represents that the Hickenlooper Amendment is an unconstitutional exercise by Congress of its legislative power, for the Amendment is a legislative interference with the judicial power and therefore violative of the constitutional doctrine of the separation of powers.

Concededly the Supreme Court grounded its application of the act of state doctrine to this case on the proposition that that doctrine arises from our governmental system of separation of powers, 376 U. S. at 423, and appellant would read this to mean that under this governmental system the case presented a non-justiciable "political question," see *Baker* v. *Carr*, 369 U. S. 186 (1962), which the Court held that it had no constitutional authority to determine. If this interpretation were correct, the courts would be required to disregard the directive of the Hickenlooper Amendment that cases arising out of foreign expropriations be decided on the merits (unless of course the Executive Branch should intervene).

But we do not think the Supreme Court holding went that far. The Court recognized " 'constitutional' underpinnings" for the doctrine, but also noted that it ". . . does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." 376 U. S. at

423. The doctrine is ". . . compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 376 U. S. at 427-28. This language would indicate that the Court found no absolute constitutional requirement that the doctrine be applied here, rather, the Court, based upon its estimation of the political effects that would follow from a judicial review of acts of foreign states, exercised its discretion in applying the doctrine.

Appellant notes from the description of the characteristics of a "political question" in *Baker* v. *Carr*, *supra* at 217, that an important characteristic of such a question is "lack of judicially discoverable and manageable standards for resolving it." It compares this to the Supreme Court's express statement that, among the nations, there is diagreement as to revelant international law standards that should be applied when the property of aliens is expropriated, because of the divergent interests and different social ideologies of different nations. 376 U. S. at 428-30. But the Supreme Court here does not state that it could not resolve the international law issue if it felt itself called upon to do so. See *The Paquete Habana*, 175 U. S. 677, 700 (1900). Indeed, our Court of Appeals was able to resolve it on the original appeal. The Supreme Court addressed itself not so much to the actual difficulty of reaching a determination upon the merits as it did to a weighing of the political effect of its making the determination it could have made in light of the divided views of different authorities as to the relevant international law standards. This is evident from the Court's statement that: "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community

of nations." 376 U. S. at 430. This language cannot be taken as an indication that the Court felt it was dealing with a non-justiciable political question; the Court specifically stated that its result was not constitutionally required, and indicated the result was reached through the utilization of an abstention policy grounded upon the exercise of judicial discretion.

Thus the application of the act of state doctrine in this case was not constitutionally compelled on the ground that the underlying issue was a political question which the Court was foreclosed from determining. To the contrary, the approach was motivated by a recognition that the issues arising from a nation's expropriation of the property of aliens are sensitive ones which the courts in some cases should be able to avoid by application of the act of state doctrine in order not to embarrass the conduct of our foreign relations. Thus a total prohibition upon the courts, declaring that they might never resort to the act of state doctrine, might well be unconstitutional as violative of the separation of powers doctrine. But we need not decide this; such a statutory prohibition upon court action is not before us. The Hickenlooper Amendment only modifies the act of state doctrine by effecting a "reversal of presumptions." S. Rep. 1188 at 24 (1964). The statute requires action by the executive to allow the application of a doctrine whereas formerly the executive was required to act if the doctrine was not to be applied. See Hickenlooper Amendment, *supra* at p. 3189.

The Supreme Court had to make its determination relative to the applicability of the act of state doctrine with but little guidance from the two political branches of the Government.[16] As the Constitution did not require the ex-

[16] The Government urged the application of the act of state doctrine before the Supreme Court. On remand before the court below it took the position that the Hickenlooper Amendment was valid and constitutional but did not apply to any pending cases.

act result reached there the Court must have exercised its discretion, based on its own judgment of the situation, to choose from among a number of constitutionally permissible alternative rules as to the applicability of the act of state doctrine. Therefore the political branches of our national government should be able to modify the Court's decision, choosing another constitutionally permissible alternative, cf. *Yakus* v. *United States*, 321 U. S. 414, 441-42 (1944), especially as the factor upon which the choice is based, the effect on our foreign relations, is admittedly more within the competence of the political branches of the Government than the competence of the Court.

The court below cites cases[17] that demonstrate that in a number of areas other than the foreign relations area the courts have changed their position due to intervening federal legislation and have decided issues which they had formerly refused to decide. The cases involve issues substantially different from the issue in the case at bar but all show a judicial policy of deferring to legislative judgment when such a course is not barred by constitutional considerations. It would seem that these cases are sufficient precedents for a similar deferral to the judgment of Congress in this case. Further, as suggested earlier, the Supremacy Clause may require a judicial surrender to the

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[17] Compare *Tennessee Power Co.* v. *TVA*, 306 U. S. 118 (1939), and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938), with *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942), and *FCC* v. *Sanders Radio Station*, 309 U. S. 470 (1940); *Willing* v. *Chicago Auditorium Ass'n*, 277 U. S. 274 (1928), with *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937); *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1940), and *Byers* v. *McAuley*, 149 U. S. 608 (1893), with *Markham* v. *Allen*, 326 U. S. 490 (1946); *City of Atlanta* v. *Ickes*, 308 U. S. 517 (1939) (*per curiam*), with *Associated Indus.* v. *Ickes*, 134 F. 2d 694 (2 Cir.), *vacated per curiam as moot*, 320 U. S. 707 (1943). All are cited at 243 F. Supp. at 975-76.

will of Congress in situations which present no constitutional impediment to judicial surrender.[18]

Thus we find that the adoption of the Hickenlooper Amendment was not a legislative interference with judicial power violative of the Federal Constitution; to the contrary, we find good reason for judicial acceptance of this legislative modification of the act of state doctrine.

C. *Legislative Interference with the Executive Power*

Appellant's last constitutional objection to the Amendment is that it represents a legislative interference with the "very delicate, plenary and exclusive power" of the President in the conduct of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936). Congress, appellant maintains, can only interfere with this presidential power in the performance of a "designated role" granted it by the Constitution.

It is doubtful that the "plenary and exclusive" presidential power over foreign affairs is this encompassing. The Supreme Court in *Curtiss-Wright* expansively described the presidential power in a case in which it upheld a delegation of authority from Congress to the President, not in a case involving a conflict, or a punative conflict, between executive and legislative power. Compare *Field* v. *Clark*, 143 U. S. 649 (1892) with *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). The language in *Curtiss-Wright* must also be contrasted to the statement of the Court in *Oetjen* v. *Central Leather Co.*, 246

[18] Inasmuch as we hold that the question presented here is justiciable, we do not reach the issue suggested by appellant that our approval of the congressional direction to the courts here requires us to consider whether there might be a constitutional compulsion that the courts accept the direction of Congress even as to issues the Court has held to be nonjusticiable because they are "political questions."

U. S. 297, 302 (1918) that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive *and Legislative* . . . Departments." (Emphasis supplied.)

Even if one accepts for the purpose of argument the view that the President holds all the residual power of the Government in the field of foreign relations, it is clear that there is ample constitutional authority for an assertion of congressional power. The power "To regulate Commerce with foreign Nations," U. S. Const. Art. I, § 8, cl. 3, combined with the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" U. S. Const., Art. I, § 8, cl. 18, is sufficient justification for the assertion of congressional power in this situation. Additional authority might also be found in Art. I, § 8, cl. 10, which grants Congress power "to define and punish . . . Offenses against the Law of Nations."

Since Congress thus clearly possesses a constitutional interest in the problem involved in this case, it was entitled to make its will known by means of a statute. In *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423 (1899) the same objection raised here, that a matter was within the President's exclusive power over our foreign relations, was disposed of by the Supreme Court with the statement that: "The subject was one in which Congress had an interest, and in respect to which it could give directions by means of a legislative enactment." *Id.* at 459.

A further difficulty with appellant's contention that the Amendment represents a legislative interference with executive power is the fact that the measure containing the Amendment was not enacted into law on the authority

of Congress alone; it was approved by the President as well. The President could have vetoed the measure if he felt it seriously threatened his freedom of action in the conduct of foreign affairs but he chose not to do so.[19] That the President gave formal approval in this manner, while not conclusive as to its constitutionality, weighs strongly in favor of the validity of the Amendment. The President may be presumed to recognize and to defnd his own interest in such a matter. There is evidence before us that the Amendment does not seriously jeopardize that interest; the Department of Justice entered an appearance in the district court as an *amicus curiae* and affirmatively took the position there that the Amendment is constitutional.

For these reasons we reject this last challenge of appellant to the constitutionality of the Hickenlooper Amendment, just as we have rejected all of its other challenges.

III. *Legality of the Cuban Seizure under International Law*

Inasmuch as we have found the Hickenlooper Amendment not to be unconstitutional and to be applicable to this case, we must follow its injunction and ". . . make a determination on the merits giving effect to the principles of international law" as to whether the taking in this case was "in violation of the principles of international law,

[19] We recognize the practical problem which faced the President here. He was presented with an extensive foreign aid bill the great majority of which was undoubtedly acceptable to him, but the bill contained as a "rider" the Hickenlooper Amendment, a provision which he might have wished to veto. However, the lack of an "item veto" is well established as part of our constitutional scheme and, in any case, we cannot presume that because he indicated opposition to it before it was passed by Congress, the President would have vetoed the Amendment even if it had been presented alone.

including the principles of compensation and other standards set out in this subsection. . . ."

On this question of whether the taking violated the principles of international law, we said on the previous appeal:

> Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nations, we hold that the decree was in violation of international law. 307 F. 2d at 868.

This holding of ours, as noted by the court below, was unaffected when the Supreme Court reversed the result we had reached. The Supreme Court based its resolution of the case upon an application of the act of state doctrine and, as appellant concedes, found it unnecessary to decide whether international law had been violated in this case. See 376 U. S. at 433, *cf.* 376 U. S. at 428-30.

We do not feel compelled to follow our former holding under the "law of the case" rule, but see *Zdanok* v. *Glidden Co.*, 327 F. 2d 944 (2 Cir.), *cert. denied*, 377 U. S. 934 (1964), but we are unable to find any convincing reason, based on argument or new authority, for altering our holding in the original appeal. Accordingly, we will not extensively discuss the international law issue but reaffirm the discussion that is contained in our opinion on the first appeal. See 307 F. 2d at 859-68. We will only comment briefly on several aspects of international law involved.

It may be noted that the Hickenlooper Amendment requires us to judge the taking here by principles of international law "including the principles of compensation and other standards set out in this subsection." The sub-

section referred to, 22 U. S. C. § 2370(e),[20] contains, besides the Hickenlooper Amendment, a provision requiring the President to suspend assistance to any country which expropriates or discriminates against property owned by

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[20] § 2370(e)(1) provides:

§ 2370. Prohibitions against furnishing assistance.

* * *

(e) Nationalization, expropriation or seizure of property of United States citizens, or taxation or other exaction having same effect; failure to compensate or to provide relief from taxes, exactions, or conditions; report on full value of property by Foreign Claims Settlement Commission; act of state doctrine.

(1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962—

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(B) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen or any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(C) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,

and such county, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy com-

United States citizens or owned by business associations which are more than 50 per cent beneficially owned by United States citizens unless the expropriating country promptly makes arrangement to compensate for such taking at full value. It is clear that if these domestic statu-

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pensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and no other provision of this chapter shall be construed to authorized the President to waive the provisions of this subsection.

Upon request of the President (within seventy days after such action referred to in subparagraphs (A), (B), or (C) of this paragraph), the Foreign Claims Settlement Commission of the United States (established pursuant to Reorganization Plan No. 1 of 1954, 68 Stat. 1279) is hereby authorized to evaluate expropriated property, determining the full value of any property nationalized, expropriated, or seized, or subjected to discriminatory or other actions as aforesaid, for purposes of this subsection and to render an advisory report to the President within ninety days aftre such request. Unless authorized by the President, the Commission shall not publish its advisory report except to the citizen or entity owning such property . There is hereby authorized to be appropriated such amount, to remain available until expended, as may be necessary from time to time to enable the Commission to carry out expeditiously its functions under this subsection.

This subsection is followed by Section 2370(e)(2), the Hickenlooper Amendment in permanent form, substantially as it appears on page 3189, *supra*, but now with the phrase "to property" twice inserted, and with proviso 3 omitted.

(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the

tory standards are different from the international law standards which we applied when we decided this case formerly, the statutory standards tend to be more exacting upon the expropriating nations. As we held that the taking before us violated international law under the possibly less exacting standards which we then applied, the application of the new statutory standards would not affect our decision here. This allows us to leave undecided whether the standard set forth in the Hickenlooper Amendment differs from the standard which we applied on the former appeal, and which we now apply again. It also allows us to avoid the question of whether Congress can thus specify how our United States courts must decide questions of international law, though "The Congress shall have Power . . . To *define* and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," U. S. Const. Art. I, § 8, cl. 10 (emphasis supplied), see *Banco Nacional de Cuba* v. *First Nat'l City Bank* (SDNY July 25, 1967). But see Falk, The Aftermath of Sabbatino 40-41 (1965); Henkin, Comments on Domke, Act of State Doctrine: Sabbatino in the Courts and in Congress, 3 Colum. J. Transnat'l L. 99, 107, 112-13 (1965).

Appellant has urged strongly that we were in error in our prior determination that it is of no particular significance that C. A. V. is a corporation organized under Cuban law. 307 F. 2d at 861, see 376 U. S. at 433, n. 37. This

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principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

would be significant if the corporation were owned by resident Cuban citizens, see *F. Palico y Compania* v. *Brush*, 256 F. Supp. 481 (SDNY 1966), *aff'd per curiam*, 375 F. 2d 1011 (2 Cir. 1967), but such is not the case here. We repeat with emphasis our earlier language:

> When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only to the "nationality" of the corporate fiction. 307 F. 2d 861.

Here it is clear from the resolution of expropriation, see footnote 2, *supra*, that the property of C. A. V. was expropriated because it was largely owned by "nationals of the United States of North America," and it is interesting to note that the resolution makes no mention whatever of the nationality of the corporation. The situation is clearly distinguishable from cases cited by appellant, such as the *Standard Oil Tankers* case, 22 Am. J. Int'l L. 404 (1918), in which a sovereign took action against a corporation because of the nationality of the corporation and not because of the nationality of the shareholders.

Also, to the extent that Congress might impose its standards in the decision of these issues, as discussed *supra*, we would be required to ignore the nationality of the corporation. The congressional standard requires full compensation for any taking of a corporation or other business association more than 50 per cent beneficially owned by United States citizens irrespective of the nominal nationality of the corporation.

Inasmuch as we thus reaffirm our previous holding that the Cuban taking is invalid under international law, we hold that there is no basis for appellant's assertion of title to the bills of lading involved in this case and its assertion that the proceeds of the sale of the sugar were tortiously converted by defendant. Appellant's claim must fail.

Affirmed.

Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of July one thousand nine hundred and sixty-seven.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges.

BANCO NACIONAL DE CUBA,
Plaintiff-Appellant,

v.

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.,
Defendants and Third Party Plaintiffs-Appellees,

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS,
Third Party Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Judgment of United States Court of Appeals for the Second Circuit

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

By: VINCENT A. CARLIN,
Chief Deputy Clerk.

Opinion and Order of Bryan, *D. J.*

This case is before me on remand from the Supreme Court of the United States (Banco Nacional de Cuba v. Sabbatino, et al., 376 376 U. S. 398 (1964)), which reversed summary judgment in favor of defendants granted by the District Court (193 F. Supp. 375 (1961)) and affirmed by the Court of Appeals (307 F. 2d 845 (1962)). The facts are fully stated in the opinions of the Supreme Court, 376 U.S. at 401-08, and of the courts below. It is unnecessary to repeat them in detail here except to the extent necessary to an understanding of the issues now presented.

The case involves the proceeds of the sale of a cargo of sugar which was expropriated by the Castro government while in Cuban territorial waters from Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.), a corporation organized under Cuban law whose capital stock was owned principally by United States citizens.

The sugar was sold to Farr, Whitlock & Co. (Farr), New York sugar brokers, and the proceeds of the sale came to the United States.

The claim of plaintiff Banco Nacional de Cuba (Banco), an instrumentality of the Cuban government, to the proceeds of the expropriated sugar is founded on the Cuban expropriation. Defendant Farr and defendant Sabbatino,[1] a State Court Receiver for C.A.V. who held the proceeds, took the position that the Cuban government was not entitled thereto but that the proceeds were the property of C.A.V. from whom the sugar was expropriated.

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[1] Subsequent to the decision of the Court of Appeals and before the decision o fthe Supreme Court, Sabbatino was discharged as received of C.A.V. and the funds in dispute were placed in escrow pending the outcome of this suit. After remand, pursuant to stipulation of the parties, the action was discontinued as against Sabbatino and the titled wa amended to name as defendants only the co-partners doing business as Farr, Whitlock & Co.

Judgment for the defendants below was granted on the ground that the expropriation of the sugar violated international law, was therefore invalid and unenforceable in our courts, and was ineffective to deprive C.A.V. of its rights in the sugar and its proceeds.

The Supreme Court held that the "act of state doctrine" prescribed a challenge to the validity of the Cuban expropriation law in this case even if it violated international law. It reversed and remanded the case to the District Court for further proceedings.

On October 7, 1964, subsequent to the decision of the Supreme Court and before judgment was entered on remand, the President signed the Foreign Assistance Act of 1964 containing an amendment sponsored by Senators Hickenlooper and Sparkman, which precipitated the present phase of this litigation. (Section 301(d)(4) of Public Law 88-633, 78 Stat. 1009, 1013, hereafter referred to as the Hickenlooper Amendment.) The Amendment provided:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other

right acquired pursuant to an irrevocabe letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in ayn case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966."

When the Amendment became law proceedings with respect to the entry of judgment on remand were still pending.

Plaintiff had moved for entry and execution of judgment in its favor. Complications not relevant here arose from the Cuban Assets Control Regulations effective July 8, 1963 (31 C. F. R. §§ 515.101-.808), which, it was claimed, required that entry of judgment and execution must be licensed by the Treasury Department. There ware further complications arising from the fact that the funds which were the subject of the action had been placed in the hands of Lehman Bros. pending the outcome of this litigation under an escrow agreement executed by Sabbatino, the C.A.V. receiver, Farr, C.A.V. and the plaintiff. Efforts to resolve these complications to the satisfaction of the various parties in interest were unsuccessful.

Plaintiff then made a superseding motion for entry and execution of judgment challenging the application and validity of the Cuban Assets Control Regulations insofar as they are claimed to relate to this case. Before that motion came on for hearing defendant Farr moved for leave to serve a third party complaint against C.A.V. and Lehman Bros. alleging their liability to Farr under the escrow

agreement for the plaintiff's claim against Farr. At this stage of the proceedings the Hickenlooper Amendment became law. Farr's motion to bring in C.A.V. and Lehman as third party defendants was then granted and the third party defendants served answers to the third party complaint.

Farr then moved pursuant to Rule 56, F.R.C.P., for summary judgment dismissing th ecomplaint on the basis of the Hickenlooper Amendment. The third party defendants made similar motions to dismiss the complaint and the third party complaint pursuant to Rules 14 and 56.

The defendants and third party defendants contend (1) that the Hickenlooper Amendment removed the bar interposed by the act of state doctrine to a determination of the validity of the Cuban expropriation under international law; (2) that the Amendment this court is now required to adjudicate that issue; and (3) that in making such an adjudication this court is bound by the determination of the Court of Appeals in this case and defendants were therefore entitled to judgment dismissing the complaint.

Plaintiff, on the other hand, maintains (1) that the Hickenlooper Amendment is not applicable to this case, and (2) that if it is it is unconstitutional in its application to this case.

Some thirty-five cases involving a wide spectrum of questions arising out of Cuban expropriations are before me which had been delayed pending the final determination of the case at bar. These cases were likely to be affected if not determined by the decision on the present motions. Opportunity was therefore given to all counsel in these cases to participate in the argument of the motions and submit briefs. A number did so.

The United States, through the Department of Justice, also appeared as amicus curiae at the suggestion

of the court. The United States took the position that the Amendment did not apply to any pending cases but that if it did it was valid and constitutional.

The questions posed here then are:

1. Does the Hickenlooper Amendment apply to pending cases generally?

2. Does it apply to the case at Bar?

3. Is it unconstitutional in any respect?

4. What is the effect of the Amendment on this case?

THE LEGISLATIVE BACKGROUND OF THE AMENDMENT

In the spring of 1964 Congress had under consideration various amendments to the Foreign Assistance Act to be embodied in the Foreign Assistance Act of 1964. The section of the Act into which the Hickenlooper Amendment was later inserted already contained a number of prohibitions against aid to Communist countries and provided specifically that no assistance was to be given to Cuba, authorized the President to place an embargo on all trade with Cuba and suspended aid to countries which had expropriated property of the United States citizens without adequate compensation. 22 U. S. C. § 2370. The latter provision was the result of an amendment enacted under the sponsorship of Senator Hickenlooper in 1962.

In the summer of 1964 in the closing days of the second session of the 88th Congress while the Foreign Assistance Act of 1964 (H. R. 11308), which had already been passed by the House, was before the Senate Committee on Foreign Relations, Senator Hickenlooper, with Senator Sparkman's co-sponsorship, proposed an amendment specifically directed at the act of state doctrine as enunciated by the

Supreme Court in *Sabbatino*.[2] The whole bill including the amendment was reported out of committee on July 10, 1964 (S. Rep. 1188, at 24). The Senate Report concerning this proposal explained it as follows:

> "The amendment is intended to reverse in part the recent decision of the Supreme Court in *Banco de Nacional de Cuba* v. *Sabbatino*. The act of state doctrine has been applied by U. S. courts to determine that the actions of a foreign sovereign cannot be challenged in private litigation. The Supreme Court extended this doctrine in the *Sabbatino* decision so as to preclude U. S. courts from inquiring into acts of foreign states, even though these acts had been denounced by the State Department as contrary to international law.
>
> "In the *Sabbatino* case, the Banco Nacional de Cuba sued to recover the proceeds of a sale of Cuban sugar by an American-owned company on the ground that the sugar, which had been expropriated, belonged to the Cuban Government. The lower courts dismissed the suit, but the Supreme Court reversed these decisions and remanded the case for further proceedings on the ground that it would not inquire into the act of the Cuban State.
>
> * * *
>
> "The effect of the amendment is to achieve a reversal of presumptions. Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudi-

[2] Amends. 1072, 1073, introduced June 23, 1964.

> cation on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy."

The amended version of H. R. 11308 was passed by the Senate on September 24, 1964. In conference with the House of Representatives some changes were made in the Hickenlooper Amendment as passed by the Senate. The conference report on the Amendment as so revised stated (H. Rep. 1925, at 16):

> "The managers on the part of the House regretted that there had not been an opportunity for thorough study and full hearings on the subject. The committee of conference amended the Senate language to pinpoint its precise effect, making it clear that it does not apply if no violation of international law principles is found, or if the case involves a short term irrevocable letter of credit issued in good faith prior to the taking of property by a foreign state. The exception in those individual cases in which the President determines that judicial review of the foreign government's action is not in the U. S. foreign policy interest is preserved. An additional change was added to limit the application of the amendment to cases in which the proceedings are commenced before January 1, 1966. This limitation was approved with the understanding that the congressional committees concerned will make a full review and study of the matter during the next Congress and make a determination on the need for permanent legislation."

The Amendment, as approved by the conference committee, passed by Congress and signed into law as part

of the Foreign Assistance Act of 1964 by the President on October 7, 1964, has already been quoted at pp. 3-4, *supra*.[3]

I

Application to Cases Pending at the Time of Enactment

The Hickenlooper amendment by its terms applies "in a case in which a claim of title or other right is asserted by * * * a foreign state (or a party claiming through such state) based upon * * * a confiscation or other taking after January 1, 1959." It is quite plain that Congress meant the legislation to apply to confiscations occurring after January 1, 1959, the date on which Castro came to power. There can be no doubt that by its specific language the Amendment applied retroactively to past confiscations and transactions arising therefrom which had occurred between January 1, 1959 and the date of its enactment.

The Amendment does not deal with confiscations and transactions in the abstract. It deals with "cases" and the action which courts are to take upon such cases. It consistently uses the word "case" throughout its text. Nowhere does it distinguish between cases pending at the time of its enactment and cases which were commenced prior

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[3] It may be noted that, during the current 1st Session of the 89th Congress, in considering the Foreign Assistance Act of 1965 both the House of Representatives and the Senate have held hearings on the Hickenlooper Amendment and both Houses have issued reports covering this subject. H. Rep. No. 321, at 31-32, S. Rep. No. 170, at 19. The House version of the Act, H.R. 7750, reenacts the Hickenlooper Amendment with only minor changes not pertinent here and extends it for one year. The Senate version, S. 1837, adopts the same minor changes as the House bill but makes the Amendment permanent. The two bills have passed their respective Houses and are now before a conference committee.

thereto. There is certainly no language which could be remotely said to exclude the case at bar.

The Amendment contains three exceptions, including that authorizing the President to determine the application of the act of state doctrine is required in a particular case by the foreign policy interests of the United States and to file a suggestion to this effect with the court. Another relates to the time by which law suits must be commenced in order for the Amendment to apply. Each of the exceptions applies "in any case." There is no doubt that when Congress intended to make exceptions it did so and it made no exceptions as to pending cases.

The direction to the courts is mandatory. It is provided that "no court in the United States *shall decline* on the ground of the federal act of state doctrine to make a determination" *in a case* which it describes. These words are not prospective as has been urged. They are mandatory in their intention and effect and require the courts to give retroactive effect to the directions of the Amendment.

Thus, looking at the Amendment in terms of its language, it plainly includes cases pending at the time of its enactment based on past confiscations and transactions coming within its terms. I find no language which can remotely be said to manifest an intention on the part of Congress to exclude pending cases or to limit its effect to prospective law suits only.

It is urged that the legislative history of the Amendment dictates the conclusion that it should not be applied to pending cases.

There is at least grave doubt as to whether, in view of what seems to be the plain meaning and intendment of the language of the Amendment, resort to legislative history is either necessary or appropriate. It has been said that resort to legislative history is justified only where the

legislation is on its face "inescapably ambiguous." Schwegmann Bros. v. Calvert Corp., 341 U. S. 384, 395 (1951) (concurring opinion of Jackson, J.). The Amendment here is far from falling within that description.

But assuming that legislative history is opposite, I find nothing in it which indicates that Congress intended the Amendment to be inapplicable to pending cases. Such indications as there are are to the contrary.

Nowhere in the reports of the Senate Committee on Foreign Relations or of the Conference Committee is there any indication of an intention to differentiate between pending cases and those not yet commenced at the date of enactment.

The report of the Senate Committee speaks not in terms of the *filing* of cases but in terms of *adjudication.* It states that "under the amendment, the court would presume that it *may proceed with an adjudication* on the merits unless the president states officially that *such an adjudication* in the particular case would embarrass the conduct of foreign policy." (Emphasis added.) It says nothing about any limitations on the power of the court to proceed with such an adjudication because the case was already pending before it.

It was the conference committee which, to "pinpoint" the precise effect of the statute, amended the Senate language so as to include additional specific exceptions "in any case" to which they applied. Its report also spaks in terms of "the case" or "individual cases" throughout without any distinction between cases brought before or after enactment.

Moreover, the addition of the January 1, 1966 cut-off date was made upon the understanding "that the congressional committees concerned will make a full review and study of the matter during the next Congress and make a determination on the need for permanent legislation."

No significant experience would be available on which to evaluate the effect of the Amendment if it were limited to cases commenced after October 7, 1964 (the date of enactment) on any realistic view of the normal time periods involved in the judicial process.

The secondary legislative history in the congressional record, for whatever it may be worth, see United States 1. International Union, Auto. Workers, 352 U. S. 567, 585-86 (1957), Schwegmann Bros. v. Calvert Corp., *supra*, throws little enough light on the problem. But what light it does throw tends to support the view that no distinction between cases pending at the time of enactment and cases subsequently commenced was intended.

As Senator Hickenlooper said "Basically the amendment is designed to assure that the private litigant is granted his day in court." 110 Cong. Rec. 18936 (daily ed., Aug. 14, 1964). Both Senator Hickenlooper in the Senate and Congressman Adair in the House, in explaining the Amendment in its final form spoke of freeing the courts in "cases before them" to enforce international law. 110 Cong. Rec. 22848-49 (daily ed., Oct., 2, 1964); 110 Cong. Rec. App. A5157 (daily ed. Oct. 7, 1964).

In introducing the Amendment Senator Hickenlooper, as co-sponsor, explained the January 1, 1959 operative date in these words

> "January 1, 1959, is the date of the coming to power of the Castro regime in Cuba and the beginning of the greatest series of illegal takings of American property in recent history. Some cut-off date is desirable and it is clear that prior to the Supreme Court's reversal of the lower courts in the Sabbatino case *parties* were not relying on any such drastic application of the act of state doctrine."

110 Cong. Rec. 18946 (daily ed., Aug. 14, 1964) (emphasis added). Plainly, Senator Hickenlooper, a lawyer, used the word "parties" as meaning parties to law suits.

These are little more than straws in the wind. But as such they indicate congressional understanding that all cases pending or otherwise arising out of the confiscations occurring after January 1, 1959 were meant to be included and certainly not that the Amendment was to be limited only to cases filed after its enactment.

Such a construction of the Amendment is entirely consistent with and in furtherance of its purposes.

The Amendment was not a haphazard rider extraneous to the purposes of the bill to which it was added. It is part of a consistent pattern of legislation, the purpose of which was to protect private investment abroad and to discourage foreign expropriations. As carried over from previous years the Foreign Assistance Act already included provisions for the cut-off of foreign aid to countries which had expropriated property of American nationals. It also provided for cutting off all aid to Cuba and authorized an embargo on trade with that country. These provisions had been strengthened from year to year. 22 U. S. C. A., § 2370 (Historical Note).

Congress was particularly concerned with the Cuban confiscations which had taken place on such a large scale. It was for this reason, as Senator Hickenlooper made clear, that the date of January 1, 1959 was used as the operative date. A prime concern was to prevent the Castro government from reaping the fruits of what Congress considered to be illegal and unconscionable acts in violation of international law. It can scarcely be assumed that Congress intended to exclude a substantial portion of the Cuban confiscations at which the statute was directed from the benefits of the statute in the absence of specific language to that effect.

It is true that the Amendment also had a broader purpose—to discourage illegal confiscations by foreign governments in violation of international law and thus to strengthen the flow of investment in commerce and protect American investments abroad under the aid program and otherwise. One of the ways in which it sought to do this was to insure that the United States did not become a "thieves' market."

It is urged that the Amendment should be construed so as to apply only to cases filed after its enactment because to do otherwise would not further these broad congressional purposes. It is difficult to see, however, how such purposes would be furthered by a construction which excluded from the deterrent effect of the Amendment a substantial number of confiscations which had already occurred and on which suits were presently pending. On the contrary, bold and immediate action with respect to all confiscations, including those already in litigation, would serve firm notice that as far as the United States was concerned no benefits would be permitted to accrue from such takings.

Congress was concerned not only with the assertion of claims to expropriated property but with permitting one who had suffered expropriation to resist a suit in our courts by the expropriating government to obtain the fruits of expropriation. (110 Cong. Rec.-App. A5157 (daily ed., Oct. 7, 1964) (remarks of Sen. Hickenlooper)). This is what had occurred in this case and in other pending cases where an instrumentality of the Cuban government was seeking to enforce its expropriation against assets in this country over which it otherwise could assert no control. To exclude such cases from the Amendment would frustrate congressional purpose.

Both the language of the Amendment and the legislative history lead to but one conclusion—that it was intended to apply to cases pending at the itme it became law.[4]

It is urged, however, that this reading is contrary to traditional canons of statutory construction.

There is much discussion in this connection as to whether the Hickenlooper Amendment is substantive, see, *e.g.*, Rescus Army v. Municipal Court, 331 U. S. 549, 570 (1947), procedural, see, *e.g.*, Bowles v. Strickland, 151 F. 2d 419 (5 Cir., 1945), remedial (in the sense of affecting the availability of remedies), see, *e.g.*, Sampeyreac v. United States, 32 U. S. (7 Pet.) 222 (1833); Landay v. United States, 108 F. 2d 698 (6 Cir., 1939), *cert. den.*, 309 U. S. 681 (1940), remedial-substantive (in the sense of remedying an existing decisional or statutory defect in substantive law), see, *e.g.*, Jamison v. Encarnacion, 281 U. S. 635 (1930); Miller v. Robertson, 266 U. S. 243 (1924), remedial-procedural (in a similar sense with respect to procedural law), see, *e.g.*, Goddard v. Frazier, 156 F. 2d 938 (10 Cir.), *cert. den.*, 329 U. S. 765 (1946). Once the proper category is selected, it is said, a traditional canon of statutory construction will tell us whether or not the Hickenlooper Amendment is to be applied to pending cases. But such a dispute over categories sheds little light on the controversy here.

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[4] There is nothing in the Cuban Claims Act, 22 U. S. C. §§ 1643-43k, which was before the Congress at approximately the same time as the Hickenlooper Amendment, or in its legislative history that in any way casts doubt upon this construction. The Cuban Claims Act was a separate bill dealing with a separate problem—the preservation of evidence of claims against the Cuban government in case diplomatic negotiations should give promise of ripening. Indeed, the vesting provision of that Act, 22 U. S. C. § 1643j, excluded property acquired by expropriation, apparently so as not to deprive persons in the position of defendants of their rights under the Hickenlooper Amendment. See 110 Cong. Rec. 22852 (daily ed. Oct. 2, 1964) (statement of Rep. Fascell, sponsor of the bill).

In the first place, what is substantive and what is procedural or remedial varies with the purpose for which the terms are used. See *e.g.*, Sampson v. Channell, 110 F. 2d 754 (1 Cir.), *cert. den.*, 310 U. S. 650 (1940). Moreover, there is always danger that the particular purpose of the terms will be lost in a mere semantic exercise. But while such categorization may have value as a matter of last resort, it is not only necessary here but actually inapposite.

Canons of statutory construction should be applied only when the intention of the legislature is unclear. If a statute "clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application," the statute must be so applied regardless of the label that may be attached to it unless such a construction would render it unconstitutional. 2 Sutherland, *Statutory Construction* §§ 2201, 2212 (3d ed. Horack 1943). The wording of the statute and its legislative history clearly show that it was intended to apply to pending cases.

Moreover, the canons are designed to aid in determining whether a statute is applicable to past transactions. But here the statute is clear on its face that it applies to all confiscations after January 1, 1959 and transactions arising therefrom. The question is whether an exception is to be made for such transactions already in litigation when the Amendment was passed.[5] Thus such cases as Claridge

[5] The Government suggests that the Amendment could be construed to apply only to transactions after its passage involving property confiscated any time after January 1, 1959. If the basic principle in the law merchant of shelter, see Uniform Commercial Code §§ 2-403(1), 3-201 & *comment 3*, is not to be abandoned, virtually the only past seizures to which the Amendment would apply would be those in which the confiscating government disposed of the property after October 7, 1964. The Cuban confiscations would be read out of the Amendment almost entirely, and there would be little if any opportunity for it to operate before January 1, 1966.

Apartments Co. v. Commissioner, 323 U. S. 141 (1944), Hasset v. Welch, 303 U. S. 303 (1938), Davis v. Wechsler, 263 U. S. 22 (1923), Cox v. Hart, 260 U. S. 427 (1922), and Winfree v. Northern Pac. Ry., 227 U. S. 296 (1913), are inapplicable. Indeed, in the *Claridge* case the statute in question was applied to reorganization proceedings pending at the time of passage but not those already closed. And the result in that case is fully in accord with the general rule of construction governing this amendment; that when a statute is to be retroactively applied to past transactions, it is applied to those involved in pending litigation as well. This rule originated in Chief Justice Marshall's opinion in United States v. Schooner Peggy, 5 U. S. (1 Cranch) 103, 109 (1801),[6] and has been followed ever since. *E.g.*, Hamm v. City of Rock Hill, 379 U. S. 306 (1964); United States v. Alabama, 362 U. S. 602 (1960) (per curiam); Hines v. Davidowitz, 312 U. S. 52 (1941); Carpenter v. Wabash Ry., 309 U. S. 23 (1940); Dismore v. Southern Express Co., 183 U. S. 115 (1901); *cf.* Vandenbark v. Owens-Illinois Co., 311 U. S. 538 (1941).

II.

The Application of the Amendment to the Case at Bar.

It is urged that the Amendment does not apply to this case at least, even if it applies to other pending cases and that Congress so intended. I find nothing to sustain that view.

The language of the Amendment does not support this position. There is no dispute that the Amendment was

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[6] Chief Justice Marshall also indicated that "in great national concerns" statutes are more likely to be construed retroactively than "in mere private cases between individuals." This is such a case.

directed at the *Sabbatino* decision and the act of state doctrine which it enunciated but there is no specific reference to this case either in the Amendment as it was introduced or as it was passed. There is merely the mandatory direction that "no court shall decline" to make a determination on the merits under the principles of international law on the ground of the Federal Act of State Doctrine in a case based on a confiscation after January 1, 1959 and commenced before January 1, 1966. This case is plainly such a case. The statute applies to this case unless it is excluded for reasons apart from its language.

If the legislative history of the statute indicated plainly that Congress intended to exclude the *Sabbatino* case from the application of the statute the Amendment might well be held inapplicable for that reason. However, I do not find anything in the legislative history which demonstrates such an intention and certainly that intention would have to be clearly expressed were the language of the Amendment to be overridden.

The reports of the committees which considered this legislation do not indicate any intention to exclude this case from the statute. The report of the Senate Committee already quoted, *supra*, pp. 8-9, states flatly "the amendment is intended to reverse in part the recent decision of the Supreme Court" in *Sabbatino*.

The report of the Committee on Conference does not mention the *Sabbatino* case at all or add anything which would shed light on the question now under consideration.

However, much reliance is placed on an excerpt from a memorandum inserted in the Congressional Record by Senator Hickenlooper during the discussions of the Amendment:

> "2. Question: 'Does the proposed amendment overrule a decision of the Supreme Court?'
>
> "Answer: 'The amendment will lead U. S. courts to a different result from that reached by the ma-

> jority in the recent Supreme Court decision in *Banco Nacional de Cuba* v. *Sabbatino*. It does not change the Court's decision in that case, * * *.' "

110 Cong. Rec. 18946 (daily ed., Aug. 14, 1956).

Material of this nature inserted in the Congressional Record must be viewed with grave reservations. As Justice Jackson said in his concurring opinion in Schwegmann Bros. v. Calvert Corp., *supra*, 341 U. S. at 396:

> "[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions."

But quite apart from this the isolated excerpt from the Hickenlooper memorandum must not be taken out of context and must be viewed against the background of the entire legislative record which is by no means brief.

The statement opposing the Amendment by the Executive Branch before the Senate Committee said unequivocally "The amendment is intended to reverse the recent decision of the Supreme Court" in *Sabbatino* and spoke of "the attempt in the subject amendment to overturn the Sabbatino decision * * *." *Hearings* 618.

In presenting the Amendment to the Senate on August 14, 1964, Senator Hickenlooper stated "This amendment goes specifically to the so-called Sabbatino decision of the Supreme Court." 110 Cong. Rec. 18935 (daily ed.). In his letter to the Washington Post inserted in the Congressional Record of the same day he said:

> "It should be noted that the amendment is not intended to reinstate the broad holding established in the trial court. *It only modifies the Supreme Court decision in the matter of presumptions.* We

> think it perfectly proper that the Congress of the United States should have the last word on this important policy question." *Id.* at 18936 (emphasis added).

In a statement inserted in the Record on that day Senator Hickenlooper said that the Amendment "assures that U.S. Courts *in cases before them* will be able to apply international law to expropriations by foreign countries," except where the President makes a suggestion to the contrary. *Id* at 18943 (emphasis added). That statement is repeated in the very memorandum containing the sentence upon which so much reliance is placed. *Id.* at 18945.

In any event what is meant by this single sentence is far from clear and it is entirely inconclusive on the question of the applicability of the Amendment to this case, in the light of the other legislative material. It certainly is far too slender a reed on which to base a holding that the Amendment does not apply to this case.

Moreover, in the light of its strongly expressed views concerning the iniquities of the Castro regime and its confiscations, it is most unlikely that Congress intended to exclude the *Sabbatino* case from the Amendment if this court has power to apply it. Due to no fault of the defendants *Sabbatino* was the bellwether case on Cuban confiscation. Some forty pending cases were delayed to await its determination by the Supreme Court. Thus, by a purely fortuitous circumstance the defendants in *Sabbatino* would be the only victims of the confiscations among the litigants who would be denied the benefits of a determination on the merits under the principles of international law.

Moreover, the Cuban government would receive a windfall. It would avoid a determination on the merits as to whether the taking had been in violation of international law.

Against the background of the fulsome record of congressional attitude with respect to the Castro government and its confiscations, no intention to permit such a result can be ascribed to Congress.

The real question as to the applicability of the Amendment in this court does not arise because the Amendment by its terms or by implication is not applicable. It arises because the case is before me on remand from the Supreme Court and judgment has not been entered.

The Supreme Court did not reach the ultimate merits of the claims asserted by the respective parties or the question of the validity of the Cuban expropriation decree. It held merely that the act of state doctrine applied, that under that doctrine the courts of this country were precluded from inquiring into the validity of the public acts of a recognized foreign sovereign power in its own territory even if such acts violated international law, and that this doctrine proscribed a challenge to the validity of the Cuban expropriation decree in this case. Any judgment to be entered in favor of the plaintiff would have had to be based on that theory and on that theory alone.

While the proceedings on remand were still pending and undetermined the Hickenlooper Amendment became law. It was specifically and soley directed at the act of state doctrine on which the Supreme Court relied and it changed the law with respect to that subject.

Assuming that the Amendment was within the constitutional powers of Congress (see pp. to , *infra*) it was then no longer the law that a challenge to the validity of the expropriation decree was proscribed by the act of state doctrine. Instead, the law as laid down by Congress then became that no court might decline to make such a determination on the ground of the act of state doctrine where the confiscation was in violation of the principles of international law. Is this court then, in a case pending before it on remand, required to follow the mandate which Congress directed to it and the law as changed by Congress.

Or is it bound under the mandate of the Supreme Court to enter a judgment consistent with the Supreme Court opinion and contrary to the law laid down by Congress—that is to say a judgment which applies the act of state doctrine so as to bar an inquiry into the validity of the expropriation decree. This is the dilemma which now faces the court.

The Supreme Court has long held to a general rule that the mandate of an appellate court forecloses the lower court from reconsidering the matters determined above. *E.g.*, United States v. Haley, 371 U.S. 18 (1962) (per curiam); United States v. Parke, Davis & Co., 365 U. S. 125 (1961) (per curiam); United States v. Urbuteit, 336 U. S. 804 (1949) (per curiam); Briggs v. Pennsylvania R.R., 334 U. S. 304 (1948); Kansas C. So. Ry. v. Guardian Trust Co., 281 U. S. 1 (1930); In re Washington & G. R.R., 140 U. S. 91 (1891); Chaffin v. Taylor, 116 U. S. 567 (1886); Tyler v. Makwire, 84 U. S. (17 Wall.) 253 (1872); *Ex parte* Dubuque & Pac. R.R., 68 U. S. (1 Wall.) 69 (1863); *Ex parte Sibbald* v. *United States*, 37 U. S. (12 Pet.) 488, 492 (1838).

The mandate rule has been applied to foreclose the lower court from considering on remand on its own jurisdiction, Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31 (1893); Skillern's Executors v. May's Executors, 10 U. S. (6 Cranch) 267 (1810) (per curiam), newly discovered evidence, In re Potts, 166 U. S. 263 (1897); Mackall v. Richards, 116 U. S. 45 (1885); Southard v. Russell, 57 U. S. (16 How.) 547 (1853), or a supervening Supreme Court decision that would allegedly require a different result, Gaines v. Rugg, 148 U. S. 228 (1893).

Of course, the general mandate rule does not apply to a question that is left open by the mandate itself. Sprague v. Ticonic Nat'l Bank, 307 U. S. 161 (1939); *Ex parte* Union Steamboat Co., 178 U. S. 317 (1900); *In re* Sandford Fork & Tool Co., 160 U. S. 247 (1895). Nor does it apply when the mandate has been amended to permit consideration of

the question. See Bay Ridge Co. v. Aaron, 334 U. S. 446, 477 (1948); 149 Madison Ave. Corp. v. Asselta, 331 U. S. 795 (1947) (per curiam); Alaska Juneau Gold Mining Co. v. Robertson, 331 U. S. 793 (1947) (per curiam).

There is no need for the mandate to be amended here.[7] The mandate reversed the decision of the Court of Appeals and remanded the case to this court "for further proceedings in conformity with the opinion of this Court." The opinion specifically left open to this court the admission of C.A.V. as a party, which is to some extent responsible for the present posture of this case. It stated "Although we discuss no remaining litigable issues of fact in this case, the District Court may hear and decide them if they develop." 376 U. S. at 408, 439. Thus, the Supreme Court envisioned that there might be more than merely formal proceedings in this court before judgment could be entered.

Moreover, the general mandate rule is inapplicable here for another reason. None of the cases cited involve a statute enacted after remand, but before the final disposition of the case. Here Congress, in the exercise of its constitutional powers, see pp. , *infra,* enacted the Amendment and gave directions that it apply to all pending cases. This constitutes the supreme law of the land. U. S. Const., art. VI, cl. 2. The mandate rule, however, sometimes referred to as the law of the case, *Ex parte* Sibbald v. United States, *supra;* Munro v. Post, 102 F. 2d 686 (2 Cir., 1939), is not of constitutional dimensions. It represents "only the practice of courts generally to refuse to reopen what has been decided," King v. West Virginia,

[7] The parties first agreed that the Hickenlooper Amendment was passed too late for the Supreme Court to amend its mandate. The third party defendants now indicate that may not be so. I will not attempt to determine the powers of the Supreme Court under its own rules, and there is no need to do so here.

216 U. S. 92, 100 (1910), as that practice has been laid down by appellate courts in the exercise of their appellate powers. The Supreme Court has expressly held that it is no denial of constitutional rights for a lower state court after remand from a state appellate court to do exactly what Congress has directed this court to do. Chase Securities Corp. v. Donaldson, 325 U. S. 304 (1945). In the fact of a constitutional assertion of power by Congress, the courts have no choice but to accommodate their administrative practices to the congressional direction.

I hold (1) that this is a case within the purview of the Hickenlooper Amendment; (2) that the Amendment is supervening law which must be applied here despite the opinion of the Supreme Court in *Sabbatino;* and (3) that I am therefore required to make a determination on the merits giving effect to the principles of international law as the Amendment provides.

III

Constitutional Aspects

The United States takes the position that the Hickenlooper Amendment is valid and constitutional whether or not it applies to pending cases and in particular to the case at bar. Plaintiff, however, claims that the Amendment violates the Constitution both generally and insofar as it is held to apply in this case. A discussion of the constitutional questions raised is in order.

(a)

The contention that Congress lacks constitutional power to enact legislation of this nature is without substance.

As to the power of Congress to enact the Amendment, Senator Hickenlooper said:

> "There can be no question that the amendment is a constitutional exercise of Congress [*sic*] powers

> with respect to the aid program, foreign commerce, and offenses against international law."

110 Cong. Rec. 18946 (daily ed. Aug. 14, 1964).

The power granted to Congress by Art. I, § 8, cl. 3, of the Constitution "to regulate Commerce with foreign Nations, and among the several States" is broad and plenary. The "power * * * is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1, 196-97 (1824). "Any rule * * * which is intended to foster, protect and conserve * * * commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress." Milford v. Smith, 307 U.S. 38, 48 (1939).

It cannot be seriously disputed that the Foreign Assistance Act is a valid exercise of congressional power under the commerce clause. American investment abroad is an important part of the Foreign Assistance program. That part of the program is dependent upon whether American investors receive fair treatment from foreign governments. As the Supreme Court said in *Sabbatino*:

> "Foreign aid given to many of these countries provides a powerful lever in the hands of the political branches to insure fair treatment of United States nationals."

376 U. S. at 435.

But Congress was of the view that the weapons available to the political branches to insure fair treatment of United States nationals investing abroad were inadequate. A major purpose of the Amendment was to afford additional protection to such investors against foreign confiscation. It was designed to "discourage foreign expropriation by making sure that the United States cannot become a 'thieves market' for the product of foreign expropriations." 110 Cong. Rec. 18944 (daily ed., Aug. 14, 1964).

Congress sought to encourage foreign investment by removing the bar of the act of state doctrine to determination on the merits of suits arising out of foreign confiscations in violation of international law.

Whether the act of state doctrine is applied or withheld by the courts may profoundly affect foreign investments and the flow of international trade and commerce as the Supreme Court recognized in *Sabbatino*. 276 U. S. at 433-436.

Congress determined that the national interests in the areas of foreign investment and international trade and commerce require the elimination of the act of state doctrine except where the President determines otherwise. It so provided in the Hickenlooper Amendment. This, like the Foreign Assistance Act itself, was plainly within the powers of Congress under the commerce clause.

Were there any doubt as to this it would be dispelled by the grant of the additional power under Art. I, § 8, cl. 18, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

It is unnecessary to look further for sources of congressional power. It may well be that, as Congress thought, the Amendment is also a valid exercise of its power under Art. I, § 8, cl. 10 to "define and punish * * * Offences against the Laws of Nations." The Amendment may also fall within the ambit of implied congressional power over foreign relations. Oetjen v. Central Leather Co., 246 U. S. 297, 302 (1918); Henkin, "The Law of the Land and Foreign Relations," 107 U. Pa. L. Rev. 903, 913-22 (1959); see United States v. Arjona, 120 U. S. 479, 483 (1887); *cf.* United States v. Curtiss-Wright Corp., 299 U. S. 304 (1936). *Contra* Patterson, "In re the United States v. Curtiss-Wright Corp." (pts. 1-2), Texas L. Rev. 286, 445 (1944).

But congressional power under the commerce clause is so clear that to discuss these less obvious questions would be merely gilding the lily.

(b)

The suggestion is made that the Amendment impinges upon the power of the President over foreign relations and thus violates the doctrine of separation of powers. I see no merit in this suggestion.

This Amendment did not become law by the action of Congress alone. It was part of an act signed into law by the President. While the Executive Branch opposed the Amendment before the Senate committee, the President did not choose to exercise his veto power when it came before him for signature. He certainly had the power to do so had he felt that the Amendment seriously impinged upon his executive functions.

Indeed, the act cannot be said to impinge on such functions. It does not preclude the President from exercising his role in foreign relations. On the contrary, the exception written into the act expressly provides that the courts shall apply the act of state doctrine whenever the President determines that the foreign policy interests of the nation require its application and makes such a suggestion. He may do so "in any case" in which he so determines, and there is nothing in the act theoretically to prevent him from so doing in every case if he determines he should make such a determination.

"The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government * * *." Oetjen v. Central Leather Co., 246 U. S. 297, 302 (1917), (quoted with approval in *Sabbatino*, 76 U. S. at 423). Congress has frequently exercised power in this field.

The Foreign Assistance Acts profoundly affecting foreign relations, are classic examples. No case has been cited and I know of none in which action by Congress, within one of the express powers granted to it by Art. I, § 8, cl. 3, which affected foreign affairs, has been stricken down as in violation of the separation of powers doctrine.

In the *Sabbatino* case itself the Supreme Court recognized that the scope of the act of state doctrine "must be determined according to federal law" drawn from sources such as the power of Congress to regulate foreign commerce under Art. I, § 8, cl. 3, and to define and punish offenses against the law of nations under Art. I, § 8, cl. 10 of the Constitution, 376 U.S. at 427 & n. 25, and refers to the power of the "political branches" to protect American investors, *e.g.*, 376 U.S. at 436.

In La Abra Silver Mining Co. v. United States, 175 U. S. 423 (1899), the exercise of congressional power touching intimately upon foreign affairs was upheld. There Congress had conferred on the Court of Claims jurisdiction to determine whether the settlement of a claim under a treaty by an international claims commission had been fraudulently obtained. The Court said in language that is highly apposite here: [T]he act is not liable to the objection that it subjected to judicial determination a matter committed by the Constitution to the exclusive control of the President. The subject was one in which Congress had an interest and in which it could give directions by means of a legislative enactment." 175 U.S. at 459.

Numerous other cases have upheld the exercise of congressional power affecting foreign relations. Thus a treaty negotiated by the President and approved by the Senate may be abrogated by act of Congress. Reid v. Covert, 354 U. S. 1, 18 & n. 34 (1957) (opinion of Black, J.); Fong Yue Ting v. United States, 149 U. S. 698, 720-21 (1893); Chinese Exclusion Case, 130 U. S. 581, 600-01 (1889); Whitney v. Robertson, 124 U. S. 190 (1888); Head Money Cases, 112 U. S. 580, 598-99 (1884).

Moreover, Congress has frequently enacted legislation in the exercise of one of its enumerated powers which was deeply concerned with foreign relations. For example, all of Title 22 of the United States Code entitled "Foreign Relations and Intercourse" deals with statutes passed by Congress on this subject matter. Of particular note are §§ 2181-84 dealing with governmental guarantee of foreign investments by United States citizens.

Nothing in Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp., 333 U. S. 103 (1948) or United States v. Curtiss-Wright Corp., 299 U. S. 304 (1936) on which plaintiff relies, is to the contrary. In both cases the presidential action involved had been authorized by act of Congress and the President had based his action on the statute. In the *Chicago & So.* case, for example, the statute involved, 49 U. S. C. § 1461, expressly provided that certificates of convenience and necessity for foreign air transportation should be subject to the approval of the President.

Thus, Congress is not restricted from exercising its enumerated powers because foreign relations are affected. The Amendment does not violate the separation of powers doctrine because it involves foreign relations and imposes a duty on the President to make specific determinations as to whether "in any case" application of the act of state doctrine is required by our foreign policy interests. It does not impinge on the constitutional prerogatives of the President in the field of foreign relations and is not unconstitutional for that reason.

(c)

Application of the act of state doctrine is not required by the Constitution as the Supreme Court made plain in *Sabbatino.*

> "* * * it cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.' *Baker* v. *Carr,* 369

> U. S. 186, 211. The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." 376 U. S. at 423.

It is true that the doctrine does have "constitutional underpinnings." 376 U. S. at 423. But this is not because the doctrine itself is of constitutional dimensions. Under the act of state doctrine the courts abstain from passing on the acts of a foreign state not because they are required to do by the Constitution but because of a sensitive regard for the functions entrusted by the Constitution to the political branches of the government in the field of foreign affairs and the foreign policy interests of the nation which may be affected by a determination on the merits of the case before the courts. The doctrine is merely a principle of decision "* * * compelled by neither international law nor the Constitution * * *." 376 U. S. at 427.

(d)

While the act of state doctrine is not of constitutional dimensions, and there is no constitutional requirement that it be applied by the courts, this does not resolve the question of whether there is a constitutional impediment to a legislative direction that the courts abstain from applying it. Plaintiff urges that there is such an impediment, and that the legislative direction to the courts in the Amendment not to apply the doctrine is an unconstitutional interference with the judicial power. I do not agree.

There is no doubt that issues concerning international law as they may affect confiscations by foreign governments are within the constitutional jurisdiction and judicial competence of the courts, as *Sabbatino* makes clear. By applying the act of state doctrine the courts have merely declined as a matter of judicial policy to decide such issues where a

decision may affect our foreign relations. The doctrine is a self-imposed discretionary rule of "judicial abnegation," 307 F. 2d at 857, under which the court as a matter of policy declines to decide the issue of the validity of a foreign act of state.

The reasons why the courts determined on such a policy are significant. As *Sabbatino* also indicates, the conduct of foreign relations is particularly a concern of the political branches of the Government. It was because of apprehension that decisions on the merits concerning acts of confiscation by foreign governments might embarass the political branches in conducting foreign relations and adversely affect the national interests in that area that the court adopted the policy of abstention.

When a determination is made by the political branches charged with the responsibility for foreign relations as to where the interests of the United States lie, it is not for the courts to say them nay. The basic reason for the application of the act of state doctrine disappears. To require that the doctrine be applied despite the express directions of the political branches on the subject would be to place the court in the position of having the last word in matters affecting foreign affairs, the determination of which is committed to other branches of the Government. This would be wholly inconsistent with the doctrine of separation of powers and with the very rationale of the act of state doctrine.

In any event Congress does not lack power to direct that the act of state doctrine be eliminated as an instrument of judicial decision.

Congress has been given a considerable measure of power with respect to the courts. See Art. I, § 8, cl. 9, (power "to constitute Tribunals inferior to the Supreme Court); Art. III, § 1, (judicial power vested in Supreme Court "and in such inferior Courts as the Congress may

from time to time ordain and establish"); Art. III, § 2, cl. 2, (appellate jurisidiction in the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make"); and Art. I, § 8, cl. 18, (power to make all laws necessary and proper "for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States * * *.").

There are a number of cases upholding acts of Congress under these powers limiting the appellate jurisdiction of the Supreme Court or the jurisdiction of the lower federal courts. *E.g.*, Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U. S. 182 (1943); Lauf v. E. G. Shinner & Co., 303 U. S. 323 (1938); *Ex parte* McCardle, 74 U. S. (7 Wall.) 506 (1868); Sheldon v. Sill, 49 U. S. (8 How.) 441 (1850).

Moreover, in a number of instances the courts have abandoned a formerly declared voluntary policy of abstention, basing their change of position in whole or in part upon an act of Congress directing that issues on which the courts had abstained should be decided. *Compare* Tennessee Power Co. v. TVA, 306 U. S. 118 (1939), *and* Alabama Power Co. v. Ickes, 302 U. S. 464 (1938), *with* Scripps-Howard Radio, Inc. v. FCC, 316 U. S. 4 (1942), *and* FCC v. Sanders Radio Station, 309 U. S. 470 (1940); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274 (1928), *with* Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937); Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (1940), *and* Byers v. McAuley, 149 U. S. 608 (1893), *with* Markham v. Allen, 326 U. S. 490 (1946); City of Atlanta v. Ickes, 308 U. S. 517 (1939) (per curiam), *with* Associated Indus. v. Ickes, 134 F. 2d 694 (2 Cir.), *vacated per curiam as moot*, 320 U. S. 707 (1943). See also the discussion of The Chicago Junction Case, 264 U. S. 258 (1924), in Alabama Power, 302 U. S. at 483-84.

In Markham v. Allen, *supra,* it was held that jurisdiction was conferred on the district court by the Trading with the Enemy Act over a suit by the Alien Property Custodian against an executor and heirs to determine his right to share in a decedent's estate then under probate administration in a state court. This was despite a previously announced judicial policy of abstention as to unsettled questions of state property law, see *e.g.,* Thompson v. Magnolia Petroleum Co., *supra,* particularly in matters within state probate jurisdiction, see *e.g.,* Byers v. McAuley, *supra.* In *Markham* the court permitted the suit because of provisions of the Trading With the Enemy Act indicating "that Congress has adopted the policy of permitting his rights under the Act, whether they depend on state or federal law." 326 U. S. at 496.

In Aetna Life Ins., Co. v. Haworth, *supra,* it was held that the Declaratory Judgment Act, now 28 U. S. C. §§ 2001-02, was valid and should be given application though Willing v. Chicago Auditorium Ass'n, *supra,* had previously indicated that the court would not entertain actions which were declaratory only. The court said in *Aetna*:

> "In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish * * *." 300 U. S. at 240 (citations omitted).

And in Yakus v. United States, *supra,* it was:

> "The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions." 321 U. S. at 422.

It seems clear that when Congress, dealing with subject matter within the powers delegated to it by the Constitution, speaks with respect to a voluntary judicial policy of self-limitation, the courts are bound to follow its directions unless compelled not to do so by the Constitution. There is no constitutional compulsion to disregard the directions of Congress as to the elimination of the self-imposed limitation of the act of state doctrine as provided in the Amendment.

As Chief Justice Marshall said in Cohens v. Virginia, 19 U. S. (6 Wheat.) 264, 404 (1821):

> "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us."

(e)

The provision in the Amendment giving the President the power to invoke the act of state doctrine in cases where national foreign policy interests so require does not oust the court of jurisdiction. Nor is it an unwarranted or unconstitutional intereference with the judicial function.

It is not unusual for Congress to enact statutes giving to the Executive Branch the power to determine finally, litigable questions in the foreign affairs field. *E.g.*, 12 U. S. C. § 632; 22 U. S. C. §§ 254, 288e-88f; see Carrera v. Carrera, 174 F. 2d 496 (D. C. Cir. 1949). And it is quite clear that the Executive may tell the courts when it is in the national interest to grant sovereign immunity to a foreign state, and that suggestion by the Executive is con-

clusive. *Ex parte Peru,* 318 U. S. 578 (1943); Rich v. Naviera Vacuba, S. A. 295 F. 2d 24 (4 Cir. 1961) (per curiam). The primacy that the Constitution delegates to the political branches in the field of foreign affairs dictates such a result.

This is not like the situation in Chicago & So. Air Lines, Inc. v. Waterman S. S. Corp., *supra,* 333 U. S. 103, and other cases in which the principle of judicial independence, established in Hayburn's Case, 2 U. S. (2 Dall.) 409 (1792), was held to have been violated.

Under the Amendment, as in the sovereign immunity situation, the President is not sitting as a court of review over decisions of the judiciary. He does not attempt to decide the merits of the controversy between the parties. He is merely given the power to determine whether the courts should abstain from deciding one aspect of the merits. The effect of what he does may not be determinative of the final outcome of the litigation. But its effect upon the foreign policy interests of the United States may well be vital.

The purpose of the Hickenlooper Amendment is to establish a presumption that an ajudication on the merits will not embarass the Executive Branch in the conduct of our foreign policy. S. Rep. No. 1188, *supra,* at 24; 110 Cong. Rec. 18936-37 (daily ed. Aug. 14, 1964). But when a presumption, designed by the courts to meet the requirements of another branch in the exercise of its plenary constitutional powers, is determined by that branch not to meet such requirements, and the courts are so advised, the courts will not give effect to the presumption. This is so even if decisions have already been made by the courts on the basis of the presumption. In such case the courts will revise their decisions accordingly. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U. S. (18 How.) 421 (1855); Clinton Bridge, 77 U. S. (10 Wall.) 454 (1870).

Thus, proper adjustment between the functions of the executive and judicial branches of the Government in the

delicate field of foreign affairs is assured, a result entirely consistent with the constitutional purpose.

(f)

Finally, it is urged that the Amendment may not be constitutionally applied in the case at bar. The thrust of this contention is that application of the Amendment would retroactively deprive plaintiff of vested property rights without due process of law in violation of the fifth amendment.

At the outset there is serious doubt as to whether this plaintiff is entitled to the constitutional protection which it seeks. Plaintiff is an instrumentality of the Cuban government and stands in its shoes. For the purposes of the case at least, it is the Cuban government. Nothing has been called to my attention and I know of nothing to the effect that a foreign government is a "person" within the meaning of the due process clause and entitled to the constitutional protections which it affords. It is difficult to imagine that the Founding fathers intended to shackle the political branches of the Government in their conduct of foreign affairs by granting such constitutional rights to foreign states.

But assuming that plaintiff is entitled to invoke the due process clause, the application of the Hickenlooper Amendment to the case at bar does not violate the Fifth Amendment.

Plaintiff goes on the theory that it acquired vested rights under the Supreme Court decision in *Sabbatino* which, once acquired, cannot be taken away by subsequent legislation. It relies on such cases as Lynch v. United States, 292 U. S. 571 (1934); Levy v. Wardwell, 258 U. S. 542 (1922); Forbes Boat Line v. Board of Comm'rs, 258 U. S. 338 (1922); United States v. Klein, 80 U. S. (13 Wall.) 128 (1871). But these cases and the theory on which they were decided are not apposite here.

In those cases rights were held to have become vested because transactions were involved which had been completed at a time when no substantive liability existed, or there was a contract with the Government for valid consideration, or judgment had been entered on the claim.[8] The parties could not be constitutionally deprived of such vested rights by subsequently enacted legislation.

Here, in contrast, plaintiff acquired no vested rights. Whatever rights it may have arose entirely from expropriation by the Cuban government. If the expropriation is wrongful under international law now it was wrongful then. No judgment has been entered in plaintiff's favor. The expropriation was plainly not made in reliance upon the protections afforded by the act of state doctrine. But even had it been, that doctrine creates no property rights. The Hickenlooper Amendment creates no new liabilities. See Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297 (1937).

Here Congress has merely lifted a bar to consideration of pre-existing questions of substantive rights and liabilities. What the Amendment accomplishes is closely analogus to what a legislature does when it extends a statute of limitations. In such case retroactivity poses no constitutional infirmity, Campbell v. Holt, 115 U. S. 620 (1885), even though the extension of the limitations period is applied to pending cases. Wright v. Union Central Ins. Co., 304 U. S. 502 (1938); Graham & Foster v. Goodcell, 282 U. S. 409 (1931).

Chase Securities Corp. v. Donaldson, *supra*, 325 U. S. 304 involving the extension of a state statute of limitations is closely analogous to this case. There judgment against the

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[8] It may be noted that the Supreme Court has on occasion upheld retroactively of statutes despite the existence of judgments, both final and otherwise. *Fleming* v. *Rhodes*, 331 U. S. 100 (1947); *American Foundaries* v. *Tri-City Council*, 257 U. S. 184 (1921); *District of Columbia* v. *Eslin*, 183 U. S. 62 (1901).

defendant was rendered by the state trial court. The judgment was reversed by the state appellate court on the ground that the statute of limitations barred the action. While the case was still pending in the trial court on remand the state legislature extended the statute of limitations so that it no longer barred the action. The state courts held that the new statute applied to the pending case and judgment was again entered against the defendant. In language that could almost have been written for the case at bar the Supreme Court held that such retroactive application of the statute did not violate the due process clause of the Fourteenth Amendment. The court said:

> "They (statutes of limitation) are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right of what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
>
> * * *
>
> "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. * * * [i]t cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the

> bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. * * * The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right." 325 U. S. at 314-16.

See also Cohen v. Beneficial Loan Corp., 337 U. S. 541 (1949).

As was said in Johannessen v. United States, 225 U. S. 227, 242 (1912), "[T]here is no such thing as a vested right to do wrong."

The Cuban government could acquire no vested right by virtue of the expropriation if it was wrongful and certainly not a vested right to be protected against liability for such wrongful act by the bar of the act of state doctrine.

There are numerous cases in which legislation has been applied in various stages of pending litigation on facts without the same strong equities for retroactivity as exist here. *E.G.*, Addison v. Huron Stevedoring Corp., 204 F 2d 88 (2 Cir.), *cert. den.*, 346 U. S. 877 (1953); Thomas v. Carnegie-Illinois Steel Corp., 174 F. 2d 711 (3 Cir. 1949) (collecting nearly 150 similar decisions at 712-13 and nn. 1-3); Darr v. Mutual Life Ins. Co., 169 F. 2d 262 (2 Cir.), *cert. den.*,

335 U. S. 871 (1948); Battaglia v. General Motors Corp., 169 F. 2d 254 (2 Cir.), *cert. den.*, 335 U. S. 887 (1948); Goddard v. Frazier, 156 F. 2d 938 (10 Cir.), *cert. den.*, 329 U. S. 765 (1946); Asselta v. 149 Madison Ave. Corp., 79 F. Supp. 413 (S. D. N. Y. 1948).

The plaintiff here has received all the due process to which it was entitled. I hold that the application of the Amendment to the case at bar does not deprive the plaintiff of any vested rights in violation of the due process clause of the Fifth Amendment.

IV.

The effect of the Amendment on this case.

Remaining is the disposition to be made of the case at bar in the light of what has thus far been held.

The moving defendants urge that judgment should be entered in their favor dismissing the complaint. Their position is that the Court of Appeals in this case has already held that:

> "Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals, we hold that the decree was in violation of international law." 307 F. 2d at 868.

And that court went on to conclude that

> [S]ince the Cuban decree violated international law, the appellant's title is invalid and the district court was correct in dismissing the complaint." 307 F. 2d at 869.

Defendants contend that since I have held the act of state doctrine as enunciated by the Supreme Court in

Sabbatino to be inapplicable to this case under the Hickenlooper Amendment, this court is bound by the prior decision of the Court of Appeals, and without further inquiry on the merits, must give judgment for the defendants dismissing the complaint. Plainly I am bound by the decision of the Court of Appeals that the expropriation by the Cuban government violated international law. The opinion of the Supreme Court does not impair that holding. Its discussion of international law was limited to the question of compensation and did not relate to questions of discrimination and retaliation. 376 U. S. at 428-30.

But defendant's position fails to take into account one vitally important factor. The Amendment provides that it shall not be applicable

> "in any case with respect to which the President; determined that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

That exception is an integral and essential part of the Amendment. It must be given effect.

It is suggested that the views of the Executive Arm on this essential question have already been adequately expressed or, at the least, it has been indicated that the President does not desire to have a suggestion made to the court on his behalf here. I cannot agree.

In reaching its determination in this case, the Court of Appeals relied on two letters, not before the district court, written by officers of the State Department, which it took to be evidence that the Executive Branch had no objection to a judicial testing of the validity of the Cuban decree.

Before the Supreme Court, however, it was made clear that these did not represent the official views of the Department and the brief on behalf of the Government urged that the act of state doctrine be applied. The Supreme Court so held.[9]

The position of the Executive Branch before Congress in opposition to the Hickenlooper Amendment has already been referred to.

Prior to the argument of the present motions counsel for the plaintiff formally requested that the President make a determination pursuant to the Amendment that the application of the act of state doctrine was required in this case by the foreign policy interests of the United States. Replying on the President's behalf the Acting Legal Advisor to the Secretary of State on November 27, 1964 said:

> "We have been advised that in the opinion of the Department of Justice the cited provision is not applicable to the above case which, as you know, was decided by the Supreme Court under the name of *Banco Nacional de Cuba* v. *Sabbatino* prior to the passage of the amendment. Accordingly, the Department of State does not believe it is appropriate for the President to make any determination with respect to this case under section 620 (e) of the Foreign Assistance Act, as amended."

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[9] It may be noted, also, that the Supreme Court expressly declined to pass on the so-called *Bernstein* exception to the act of state doctrine predicated upon a letter from the Acting Legal Advisor to the State Department written for the purpose of relieving the court from any constraint upon the exercise of its jurisdiction to pass on the validity of the foreign decree involved in that case. 376 U. S. at 420; see *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2 Cir.), *cert. den.*, 332 U. S. 772 (1947); *Bernstein* v. *N. V. Nederlandsche-Amerikaanache Stoomvaart-Maatschappij*, 173 F. 2d 71 (2 Cir. 1949), 210 F. 2d 375 (2 Cir. 1954) (*per curiam*).

Thus, as far as the record in this case is concerned, the President has made no determination as to whether application of the act of state doctrine is required by the foreign policy interests of the United States. It appears that such a determination has been withheld upon the assumption, which I have now held to be erroneous, that the Hickenlooper Amendment did not apply to this case at all, and that the decision of the Supreme Court in *Sabbatino* remained applicable.

The United States on these motions urged that the Amendment did not apply to cases pending in the courts at the time of its enactment and thus would not apply to the case at bar. Its position is consistent with that taken by the Acting Legal Advisor of the Department of State in his letter of November 27, 1964.

It is plain to me that proper respect and consideration for the Executive Arm requires that the court give full opportunity to the President to make the determination provided for by the Amendment and if, in his wisdom he sees fit, to have a suggestion filed on his behalf that in this case application of the act of state doctrine is required by the foreign policy interests of the United States.

This is not a situation where the court should make assumptions as to what the presidential position may or may not be on the basis of a confusing and somewhat incomplete record. On the contrary, it is a fundamental intendment and purpose of the Amendment that the Executive Branch be given full opportunity to express its views if it so desires. To fail to give it that opportunity would nullify the protections expressly given by the Amendment to the interests of the United States foreign policy.

I would assume that the Executive Arm will be able to make such a determination and to file a suggestion with the court as the Amendment provides if it so desires within sixty (60) days of the filing of this opinion. If more time is required the court should be so advised.

For these reasons determination of the question as to whether final judgment dismissing the complaint should be entered in this case will be withheld for a period of sixty (60) days for the purposes I have indicated.

It is so ordered.

Dated: New York, N. Y.
July 30, 1965

FREDERICK VP. BRYAN,
U. S. D. J.

Supplemental Opinion and Order of Bryan, *D. J.*

In my opinion dated July 30, 1965 I held that the Hickenlooper Amendment included in the Foreign Assistance Act of 1964 (Section 301(d)(4) of the Public Law 88-633, 78 Stat. 1009, 1013, 22 U. S. C. § 2370(e)(2), applied to the case at bar, now before me on remand from the Supreme Court of the United States.[1]

The Amendment removed the bar of the act of state doctrine as enunciated by the Supreme Court in this case (Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398 (1964)), to a determination on the merits as to whether the expropriation by the Castro government of the cargo of sugar involved here violated the principles of international law, unless the President determined and suggested to the court that the application of the doctrine was required by the foreign policy interests of the United States.

[1] It may be noted that in the Foreign Assistance Act of 1965 (Public Law 89-171, 79 Stat. 653), which became law on September 6, 1965, § 301(d) as it read in the 1964 Act was further amended by striking out the provision to the effect that it did not apply "in any case in which the proceedings are commenced after January 1, 1966."

Up to the time when the opinion of July 30, 1965 was filed there had been no determination by the President that the application of the act of state doctrine to this case was required by the foreign policy interests of the United States, and no suggestion to that effect had been filed with the court. However, the record was incomplete and unclear as to the position which the President might desire to take on this question.

In order to afford the executive arm full opportunity to make such a determination and to express its view to the court if it so desired, I withheld decision for a period of sixty (60) days as to whether final judgment dismissing the complaint in this action should be entered. Prior to the expiration of that period the court received a letter from the United States Attorney for the Southern District of New York dated September 29, 1965, reading as follows:

> "In its decision of July 30, 1965 this Court afforded the Executive Branch the opportunity to file a suggestion indicating whether the application of the act of state doctrine is required by the foreign policy interests of the United States, as provided for in Section 620(e)(2) of the Foreign Assistance Act of 1961, as amended (22 U. S. C. 2370(e)(2)). I am instructed to inform the Court that no determination has been made that application of the act of state doctrine is required in this case by the foreign policy interests of the United States.
>
> "So that there will be no ambiguity, the Court is advised that no such determination is contemplated."

This letter makes it clear that the President will make no suggestion to the court in this case as to the application of the act of state doctrine pursuant to the Hickenlooper Amendment. The court must therefore determine the defendants' motion for judgment dismissing the complaint.

The moving defendants urge that entry of final judgment in their favor is now required by the prior decision of the Court of Appeals in this case, 307 F. 2d 845 (1964). In that decision the Court of Appeals affirmed the judgment of the district court dismissing the complaint granted on the defendants' motion for summary judgment. It held that the act of state doctrine did not bar determination on the merits in this case and that the Cuban decree of confiscation on which plaintiff's claim was founded violated international law. It stated (p. 868):

> "Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals, we hold that the decree was in violation of international law."

The court concluded (p. 869):

> "[S]ince the Cuban decree violated international law, the appellant's [plaintiff's] title is invalid and the district court was correct in dismissing the complaint."

The reversal of the Court of Appeals decision by the Supreme Court in Banco Nacional de Cuba v. Sabbatino (*supra*) was on the sole ground that the act of state doctrine proscribed a challenge to the validity of the Cuban expropriation decree even if it violated international law. The Supreme Court did not reach the question of violation of international law passed upon by the Court of Appeals and, indeed, such discussion of international law as there was in its opinion concerned only adequate compensation and not discrimination and retaliation. 376 U. S. at 428-30.

As I have held, application of the act of state doctrine

to this case is now barred by the Hickenlooper Amendment since there will be no presidential suggestion to the contrary. The holding of the Supreme Court that the act of state doctrine bars determination on the merits no longer applies.

The Court of Appeals has already determined that absent the bar of the act of state doctrine the Cuban decree in this case on which plaintiff's claim is founded violated international law, that plaintiff's title, therefore, is invalid, and that defendants are entitled to judgment dismissing the complaint. I am plainly bound by that determination which is decisive of the issue now before me.

Defendants' motion to dismiss the complaint is therefore granted. The dismissal of the complaint necessarily disposes of the claim made by defendants in the third party complaint against the third party defendants Compania Azucarera Vertientes-Camaguey de Cuba and Lehman Brothers, and the motion of the third party defendants to dismiss the third party complaint is also granted.

The motion of the third party defendants to dismiss the plaintiff's complaint may raise additional issues which are now unnecessary to decide and are therefore denied as moot.

Judgment will be entered accordingly.

It is so ordered.

Dated: New York, N. Y.
November 15, 1965

FREDERICK VP. BRYAN,
U. S. D. J.

Judgment Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Court, the Honorable Frederick vP. Bryan, United States District Judge, having handed down its Memorandum Opinion dated November 15, 1965 and filed on November 16th, 1965 granting the Defendants and 3rd Party Plaintiffs motion to dismiss the complaint, and disposing of the claim made by the Defendants and 3rd Party Plaintiffs in the 3rd Party complaint against the 3rd Party Defendants, and granting the motion of the 3rd Party Defendants to dismiss the 3rd Party complaint, it is

ORDERED, ADJUDGED and DECREED: That the Defendants F. Shelton Farr, William F. Prescott, Emmet Whitlock, Lawrence H. Dixon, H. Bartow Farr, Elizabeth C. Prescott, Fabio Freyre, and Helen G. Downs, co-partners doing business as Farr Whitlock & Co. have judgment against the Plaintiff Banco National De Cuba dismissing the complaint, and it is further,

ORDERED, ADJUDGED and DECREED: That the 3rd Party Defendants Compania Azucarera Vertientes-Camaguey De Cuba and Lehman Brothers have judgment against the defendants and 3rd Party Plaintiffs F. Shelton Farr, William F. Prescott, Emmet Whitlock, Lawrence H. Dixon, H. Bartow Farr, Elizabeth C. Prescott, Fabio Freyre and Helen G. Downs, co-partners doing business as Farr, Whitlock & Co. dismissing the 3rd Party complaint, and it is further,

Judgment Appealed From

ORDERED, ADJUDGED and DECREED: That the motion of the 3rd Party Defendants Compania Azucarera Vertientes-Camaguey De Cuba and Lehman Brothers to dismiss the plaintiff's complaint is denied.

Dated: New York, N. Y.
November 17th, 1965

JAMES E. VALECHE,
Clerk.

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Supreme Court of the United States

October Term, 1967

No. 968

Supreme Court, U.S.
FILED
JAN 25 1968
JOHN F. DAVIS, CLERK

BANCO NACIONAL DE CUBA,

Petitioner,

—against—

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.,

Respondents,

—against—

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA AND LEHMAN BROTHERS IN OPPOSITION

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RICHARD D. KATCHER,
SIMPSON THACHER & BARTLETT,
Of Counsel.

January 25, 1968

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Supreme Court of the United States

October Term, 1967

No. 968

BANCO NACIONAL DE CUBA,

Petitioner,

—against—

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.,

Respondents,

—against—

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA AND LEHMAN BROTHERS IN OPPOSITION

Statement of the Case

This case arises out of the remand by this Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964). The Court below (Pet. App. 31-38,* 383 F.2d 166, 168-72 (2d Cir. 1967)) and the District Court (Pet. App. 65-68, J.A. 15a-18a, 243 F. Supp. 957, 960-62 (S.D.N.Y. 1965)) have set forth the facts necessary for an understanding of the issues now presented.** Briefly, in February and July

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* Citations with the prefix "Pet. App." denote references to the judgments and opinions below which are appended to the Petition herein; those with the prefix "J.A." refer to the Joint Appendix in the Court below.

** The facts underlying Petitioner's claim for relief are also set forth in the *Sabbatino* opinions of this Court (376 U.S. at 401-07), the Court of Appeals (307 F.2d 845, 849-52 (2d Cir. 1962)) and the District Court (193 F. Supp. 375, 376-77 (S.D.N.Y. 1961)).

of 1960, Respondent Farr, Whitlock & Co. ("Farr, Whitlock") contracted to purchase a quantity of sugar from a wholly owned subsidiary of Respondent Compania Azucarera Vertientes-Camaguey de Cuba ("C.A.V."), a Cuban corporation virtually all of the stock of which was owned by United States nationals. The sugar was to be loaded on board a ship standing offshore at the Cuban port of Jucaro, with payment to be made in New York upon presentation of a sight draft and shipping documents.

Thereafter, on July 6, 1960, Congress amended the Sugar Act of 1948 to permit a reduction by the President of the sugar quota allotted to Cuba, and the President exercised the granted power. In retaliation, the Cuban government on the next day promulgated Law No. 851 giving the Cuban executive arm discretionary authority to nationalize, "through forced expropriations," the properties or enterprises in which "physical and corporate persons who are nationals of the United States of North America . . . have an interest, even though they be organized under the Cuban laws."*

Between August 6 and August 9, 1960, all the sugar under contract was loaded on board ship. Pursuant to the authority granted by Law No. 851, the Cuban President and Prime Minister promulgated a resolution, dated August 6, 1960, expropriating the property of specifically named enterprises in which "nationals of the United States of North America . . . have a predominating interest . . . ," including C.A.V. and its wholly owned subsidiary.** As a result of this resolution, Farr, Whitlock was

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* The full text of Cuban Law No. 851 is set out in 376 U.S. at 401-02 n. 3.

** The resolution is reprinted at 376 U.S. at 403-05 n. 7.

compelled to enter into contracts virtually identical to those it had made with C.A.V.'s subsidiary, with Banco Para el Commercio Exterior de Cuba ("Banco Exterior"), an instrumentality of the Cuban Government, in order that the ship carrying the sugar might sail. Banco Exterior then assigned the bills of lading to Petitioner, the financial agent of the Cuban Government, and they were subsequently obtained by Farr, Whitlock, which negotiated them and received payment for the sugar. Farr, Whitlock refused to remit the proceeds to Petitioner due to C.A.V.'s claim that the expropriation was ineffective to deprive it of its rights.

Petitioner, basing its claim on the Cuban expropriation, then brought this suit in the Federal District Court for the Southern District of New York to recover the proceeds. Both the District Court (193 F. Supp. 375) and the Court of Appeals (307 F.2d 845) found Petitioner's claim to be without merit, holding that the expropriation in question violated international law. This Court (376 U.S. 398) held the act of state doctrine applicable and reversed and remanded for further proceedings.

With the case still pending on remand in the District Court, Congress enacted § 301(d)(4) of Public Law 88-633, 78 Stat. 1013, 22 U.S.C. § 2370(e)(2) (1964) ("the Amendment") which provides that the act of state doctrine should not be applied in certain specified cases. The District Court (Pet. App. 65, J.A. 15a, 243 F. Supp. 957) found that the Amendment applied to cases pending at the time of its enactment, including the case at bar, that generally, and as applied, the Amendment was clearly constitutional, and that it was bound by the Court of Appeals' prior decision that Cuba's violation of international law rendered its title invalid. The Court withheld entry of judgment for sixty days,

however, to afford the President ample opportunity to make the determination provided for in the Amendment as to whether the application of the act of state doctrine was required in this case by the foreign policy interests of the United States. Pet. App. 106-07, J.A. 56a-57a, 243 F. Supp. at 981. In response to this opportunity, the Court received a letter, dated September 29, 1965, from the United States Attorney for the Southern District of New York stating that no such determination had been made, and "so that there will be no ambiguity, the Court is advised that no such determination is contemplated." Pet. App. 108, J.A. 58a, 272 F. Supp. at 837.

Thereafter, the District Court entered its judgment dismissing Petitioner's complaint. Pet. App. 111, J.A. 61a. The Court of Appeals affirmed on all issues and reiterated its prior holding that the expropriation decree violated international law.

Reasons for Denying the Writ

1. The Court of Appeals' resolution of the constitutional questions involved herein is, as conceded by the Government below,* in accord with and compelled by prior decisions of this Court. Thus, further review is unnecessary since it would not call for an exposition of any principles not already established, without any conflict of decisions.

Congress' constitutional authority to enact legislation of this kind, pursuant to its powers to regulate foreign com-

* While the United States, through the Department of Justice which appeared *amicus curiae* in the District Court, urged against the application of the Amendment to this case as a matter of statutory construction, it conceded that even as so applied it was "valid" and "constitutional." See Pet. App. 59, 383 F.2d at 183; Pet. App. 87, J.A. 37a, 243 F. Supp. at 971. The Government did not participate in the Court of Appeals.

merce (U.S. Const. Art. I § 8, cl. 3) and define and punish offenses against the Law of Nations (U.S. Const. Art. I § 8, cl. 10), is unquestionable. When this Court in *Sabbatino* held "the scope of the act of state doctrine must be determined according to federal law" (376 U.S. at 427), the first two authorities cited were the foreign commerce power and the power to define and punish. 376 U.S. at 427 n. 25. And, as *Sabbatino* also set forth, whether or not the act of state doctrine is applied in suits arising out of foreign confiscations may significantly affect foreign commerce and the "flow of international trade." 376 U.S. at 433. Despite the the indisputable power of Congress to legislate in this area, Petitioner asserts that the Amendment unconstitutionally infringes on the power of the Judicial and Executive branches.

(a) Petitioner bases its claim that the Amendment unconstitutionally invades the power of the Judiciary on its assertion that this Court has already decided that the validity of a taking by a foreign sovereign within its own territory "is not a subject for judicial determination." Petition, p. 8. But this is clearly a misinterpretation of the Court's *Sabbatino* decision. The Court there made it very clear that these issues are within the constitutional jurisdiction and competence of the courts.

> "The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." 376 U.S. at 423.
>
> "This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law." 376 U.S. at 430 n. 34.

Seeking support for its erroneous assertion of non-justiciability, Petitioner attempts to find in this case the ele-

ments listed by the Court in *Baker* v. *Carr*, 369 U.S. 186 (1962), to describe a non-justiciable "political question." According to *Baker*, however, the political question doctrine is a facet of the constitutionally dictated separation of powers doctrine (369 U.S. at 210, 217) and involves the Court in a "delicate exercise in constitutional interpretation" in determining whether the matter in suit "has in any measure been committed by the Constitution to another branch of Government." *Id.* at 211. As we have shown above, *Sabbatino* thoroughly disposed of any contention that this case involves a non-justiciable political question in the constitutional sense. See Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 822 n. 57 (1964).

Moreover, contrary to Petitioner's contentions, the *Baker* elements are not presented here.* Regarding the first element, a constitutional commitment of the issue to a coordinate political branch, *Sabbatino* specifically recognized that although this case may bear upon foreign relations, that fact does not put it "beyond judicial cognizance." 376 U.S. at 423. As to the second element, Petitioner (p. 8), citing *Sabbatino*, asserts a "lack of judicially discoverable and manageable standards" for resolving the question of validity of Cuba's confiscation. This Court, however, stated that "we do not, of course, mean to say that there is no international standard in this area . . ." (376 U.S. at 429 n. 26) and did not in any way intimate that courts would be unable to

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* Significantly, the Court in *Baker* omitted act of state cases from its list of prior political question cases, even under the specific category head of "Foreign Relations."

"discover" and "manage" the standard if called upon to do so. See *The Paquete Habana;* 175 U.S. 677, 700 (1900). Certainly, the Court of Appeals was able to resolve these questions in this case, and, as conceded by Petitioner (p. 19), its finding of violation of international law was undisturbed by this Court. Additionally, the Amendment incorporates by express reference the standards of compensation to be applied. See Vaughter, Comment, 2 TEX. INT'L L. FORUM 107, 114-16 (1966).

Petitioner also seeks to wring four other elements from *Baker:* (1) that the validity of the Cuban confiscations cannot be decided "without an initial policy determination of a kind clearly for non-judicial discretion;" (2) that courts cannot resolve the issues "without expressing lack of respect due the Executive Branch;" (3) that necessity demands "adherence to a political decision already made;" and (4) that there is "great potentiality of embarrassment from multifarious pronouncements of various departments on one question." Petition, pp. 8-11. There are simple answers to these contentions. As to the first, Congress has already made the policy determination as it was clearly competent to do. As to the second, the Executive is not the sole guardian of international law in the United States. *E.g., The Paquete Habana, supra* at 700. As to the third and fourth, the proviso of the Amendment pays adequate deference to the role of the Executive in managing delicate international situations because it broadly authorizes the Executive to prevent adjudication if the foreign policy interests of the United States require it. The possibility of inter-branch conflict is therefore carefully removed by the design of the Amendment itself, inasmuch as it en-

sures — as in the case of sovereign immunity suggestions* — what the District Court aptly described as a "proper adjustment between the functions of the executive and judicial branches . . . , a result entirely consistent with the constitutional purpose." Pet. App. 98-99, J.A. 48a-49a, 243 F. Supp. at 977. Moreover, in this case, after ample opportunity for deliberation, the Executive made it clear that application of the act of state doctrine was not required by the foreign policy interests of the United States. See p. 4, *supra.*

Of course, Congress may not compel the courts to decide cases which are without their constitutional power to decide.** The act of state doctrine, however, was not compelled by the Constitution (*e.g.*, 376 U. S. at 427), but rather by an exercise of this Court's discretion in choosing among a number of constitutionally permissible alternatives. Pet. App. 55-56, 383 F.2d at 181. As said in *Yakus* v. *United States,* 321 U. S. 414, 442 (1944):

> "The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions."

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* In *Rich* v. *Naviera Vacuba, S.A.,* 197 F. Supp. 710 (E.D. Va.), *aff'd,* 295 F.2d 24 (4th Cir. 1961) (*per curiam*), upon which Petitioner relies so heavily, the Courts refused to adjudicate because sovereign immunity suggestions were filed on behalf of the Executive, without, it may be noted, the great embarrassment Petitioner foresees from employment of the comparable act of state suggestion procedure. See McDougal, *Act of State in Policy Perspective: The International Law of an International Economy,* in PRIVATE INVESTORS ABROAD — STRUCTURES AND SAFEGUARDS 327, 344 (1966). Even if the Amendment were law in 1961, sovereign immunity would still have presented a bar to suit. See *American Hawaiian Ventures, Inc.* v. *Latuharhary,* 257 F. Supp. 622, 626 (D.C.N.J. 1966).

** The cases cited by Petitioner (p. 7) merely contain hornbook statements of law to this effect.

Ultimately Petitioner's argument must rest on the untenable theory that Congress cannot direct a court to decide questions which, previously, in its discretion it had refused to decide, but which are within its constitutional competence to decide. The cases cited by both the Court below (Pet. App. 56 n. 17, 383 F.2d at 181 n. 17) and the District Court (Pet. App. 95, J.A. 45a, 243 F. Supp. at 975-76) amply demonstrate that courts have "changed their position due to intervening federal legislation and have decided issues which they had formerly refused to decide," and these cases are sufficient precedent for similar action here. Pet. App. 56, 383 F.2d at 181. We need only add what this Court said in its recent decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967):

> "[T]he question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative."

(b) Petitioner's challenge to the Amendment on the ground that it unconstitutionally invades the power of the Executive is likewise without merit. That foreign relations are not the exclusive province of the President is shown by *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918), where it is stated that the conduct of foreign relations "is committed by the Constitution to the Executive and Legislative" departments of government.* Moreover, as shown above, the Amendment is a valid exercise of congressional power under the commerce clause and the power to define and punish.

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* Similarly, *Chicago & S. Airlines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) and *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), are acknowledgments of congressional power in this area since, in both cases, the presidential action involved was authorized by and based upon an act of Congress.

Since Congress clearly has a constitutional interest in the issues involved, it is entitled to make its will known by statute. In *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899), the same objection raised here, that a matter was within the President's exclusive power over foreign relations, was disposed of by this Court as follows:

> "[T]he act . . . is not liable to the objection that it subjected to judicial determination a matter committed by the Constitution to the exclusive control of the President. The subject was one in which Congress had an interest, and in respect to which it could give directions by means of a legislative enactment." *Id.* at 459.

As noted by the District Court, Petitioner has been unable to point to any case, and we are unaware of any, where congressional action under the commerce clause affecting foreign affairs has been struck down as violating the doctrine of separation of powers. Pet. App. 91, J.A. 40a-41a, 243 F. Supp. at 973.

As to the contention that the presidential proviso is inadequate in that it does not provide the "flexibility" required by the Executive, we need only note that the flexibility involved seems to be either to invoke the act of state doctrine or not to invoke it. This choice is preserved and respected by the Amendment. See Folsom, *The Sabbatino Case: Rule of Law or Rule of "No Law"?*, 51 A.B.A.J. 725, 730 (1965). That the President, who must be presumed to know and be zealous to maintain the prerogatives of his office, signed the Amendment into law, coupled with the Justice Department's position that it is constitutional, provides compelling evidence that those prerogatives are not endangered.

(c) The sweeping statement that "constitutional due process questions raised by a retroactive statute are difficult and such statutes have generally been held invalid" (Petition, p. 18), is insufficient to present a substantial question in this case. *Lynch* v. *United States,* 292 U. S. 571 (1934) and *Forbes Pioneer Boat Line* v. *Board of Comm'rs,* 258 U. S. 338 (1922), which are the only two cases cited in the Petition holding retroactive legislation invalid,* and all other cases cited by Petitioner to the Court below, involve retroactive legislation destroying vested property rights or creating new liabilities. Pet. App. 52, 383 F.2d at 179. Here, Petitioner never acquired any vested or legally cognizable rights. Whatever "rights" it had arose by virtue of confiscation, and if the confiscation was unlawful, no right could attach as a result of it. See *Johannessen* v. *United States,* 225 U. S. 227, 242 (1912).

Additionally, the Amendment neither destroys any right, assuming one to exist, nor creates any new liability. By enacting the Amendment, Congress simply lifted a bar to the consideration of questions of substantive rights and liabilities. This is precisely what occurs when a legislature extends or repeals the period of limitations, and in such a case retroactivity does not present a constitutional problem (*e.g., Campbell* v. *Holt,* 115 U. S. 620 (1885)), even though the extension is applied to pending cases. *Chase Sec. Corp.* v. *Donaldson,* 325 U. S. 304 (1945).

2. The attempt to overturn the decision below on the ground that the Amendment does not apply retroactively to

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* *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297 (1937), and *Graham & Foster* v. *Goodcell,* 282 U. S. 409 (1931), both held the particular retroactive statutes there involved constitutional.

this case is also without merit. Statutes are applied retrospectively when they "clearly, by express language or necessary implication, indicate that the legislature intended a retroactive application." 2 SUTHERLAND, STATUTORY CONSTRUCTION §2201 at 115 (3d ed. 1943). Here, Congress has decreed that the Amendment be applied to all cases "in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon . . . a confiscation or other taking after January 1, 1959. . . ." Thus, the Amendment, by it terms, applies to claims based on past confiscations occurring between January 1, 1959 and the date of enactment, including the claim here involved.

The use of the January 1, 1959 date is itself significant. It marks the coming to power of the Castro regime, and there is no reasonable explanation for its use other than that it was intended to make the Amendment applicable to the Cuban confiscations.* There is not the slightest basis for inferring Congressional intent to discriminate among the victims of those confiscations by denying some of them the protection of the Amendment, depending, for example, on whether title based on these confiscations was acquired before or after adoption of the Amendment. See Petition, p. 16.

It is now firmly established, as correctly held by the Court below, "that when a statute specifically applies to past transactions, as the . . . Amendment does, it applies to pending causes too. . . . " Pet. App. 40, 383 F. 2d at 173. Petitioner attaches significance to the Court of Appeals' acknowledgment that the cases announcing this well known

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* ". . . January 1, 1959, is the date of the coming to power of the Castro regime in Cuba and the beginning of the greatest series of illegal takings of American property in recent history." 110 Cong. Rec. 19557 (1964) (memorandum of Senator Hickenlooper).

rule "differ from the present case in some particulars," one being a criminal case, others involving injunctive relief, or the effect of a new treaty or change in case law. However, Petitioner has never pointed to a "convincing reason why the rule should not be applied in this case where a statute has become law while the case has been pending." *Ibid.**

3. Whether this Court's mandate in *Sabbatino* precludes consideration of the Amendment on remand has no wider application than to the parties in this case and involves no question of general importance. The issue, which seems never to have arisen before in a federal court (Pet. App. 49, 383 F.2d at 178), stems from facts peculiar to *Sabbatino;* that federal legislation required consideration by the District Court, in the absence of a Presidential interposition, which might and did give rise to a different result in a case still pending, after Supreme Court decision leaving open certain further proceedings in the District Court.

Even considering the merits of the issue, there is no need for further review because the decision below was clearly correct. Without regard to whether the actual terms of the mandate permit application of the Amendment, the "mandate rule" is inapplicable to this case. It represents "the practice of courts generally to refuse to reopen what has been decided." *King* v. *West Virginia,* 216 U. S. 92, 100 (1910); see *Messenger* v. *Anderson,* 225

* Respondents are in accord with both the Court below (Pet. App. 41, 383 F.2d at 173) and the District Court (Pet. App. 73-74, J.A. 23a-24a, 243 F. Supp. at 964) that where a statute is as clear as this one there is no need to resort to legislative history. Nevertheless, both Courts did extensively examine the history and concluded that it supported retroactive application of the Amendment to this case. Pet. App. 47, 48, 383 F.2d at 177; Pet. App. 78, 83-84, J.A. 28a, 33a-34a, 243 F. Supp. at 966, 969.

U. S. 436 (1912). But, as the cases cited by the Court below show (Pet. App. 50, 383 F.2d at 178), the practice is inapplicable and is disregarded and a lower court is not bound to follow the mandate of an appellate court when the mandate is affected by a higher authority. Here, Congress has exercised its constitutional powers to formulate national policy regarding the disposition of international law questions coming within the purview of the Amendment. The mandate is thus not to be used to bar the exercise of constitutional powers, and the courts will and should accommodate their administrative practice to the congressional directive. Congress clearly has the power to "prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." *Prima Paint Corp., supra* at 405.

4. Petitioner argues that this confiscation does not involve an international law issue because C.A.V. was organized under Cuban law. The cases allegedly supporting the proposition that place of incorporation is determinative (Petition, p. 13) are not even remotely in point, as they do not deal with the problem of whether or not an international law issue is presented.* "Over ninety per cent of

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* Thus, *Louisville, C. & C. R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844), and *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476 (1933), involved the issue of "citizenship" for the purpose of Federal diversity jurisdiction. *United States* v. *Northwestern Express Stage and Transportation Co.*, 164 U.S. 686 (1897), affirmed that corporations are citizens for the purpose of qualifying to present claims for property destroyed by Indian depredations, and *The Pedro*, 175 U.S. 354 (1899), recognized that the flag determines the vessel's nationality in prize cases. Similarly, *Behn Meyer & Co.* v. *Miller*, 266 U.S. 457 (1925), in which this Court's decision was simply a construction of a specific section of the Trading with the Enemy Act, and the *Standard Oil Tankers Case*, 22 Am. J. Int'l L. 404 (1928), in which the tribunal construed the Treaty of Versailles, do not involve the point at issue.

C.A.V.'s shareholders were United States nationals" (307 F.2d at 861), and the expropriation decree makes clear that its property was seized because of that fact. See p. 2, *supra*. In view of this the Court of Appeals rightly rejected Petitioner's formalistic argument.

> "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only at the 'nationality' of the corporate fiction." Pet. App. 64, 383 F.2d at 185; 307 F.2d 861.*

That disregard of the corporate entity is entirely proper under international practice is established by the authorities cited by the Court of Appeals (307 F.2d 861), such as the *Delagoa Bay Ry. Case,* [1902] For. Rel. U.S. 848 and *El Triunfo,* [1902] For. Rel. U.S. 859. In these arbitrations the United States interposed claims on behalf of American nationals as owners of foreign companies, which, as here, were exploited by the state of incorporation. The tribunals looked beyond the corporate entity and found international law issues involved. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 171 (1963), states:

> "International law only takes account of the real nationality of the physical persons covered by the legal fiction of corporate personality . . . . In other words, international law deliberately sacrifices the unitary conception of a legal personality which regards corporations as having a single nationality in

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* *Daniel* v. *Commissioners,* 2 Knapp's P.C. Rep. 23 (1825), and *Lang* v. *Commissioners,* 2 Knapp's P.C. Rep. 51 (1823), are inapplicable in that they involve construction of treaties, and are not applications of general international law. *Janson* v. *Dreifontein Consolidated Mines, Ltd.,* [1902] A.C. 484, is likewise not in point as the tribunal was not applying international law but the public policy of Great Britain.

order to look beyond the legal forms and to determine the interests and the parties actually suffering injury." (Footnotes omitted)

Petitioner eventually resorts to the argument that "endless mischief" would result from any rule other than the one it espouses. Petition, p. 14. These dire predictions seem merely to be props for advocacy; the problems are all subject to resolution within the judicial process and, as observed by the Court below, a ready standard exists in the Amendment itself.* Pet. App. 64, 383 F.2d 185.

5. The Court of Appeals' holding that the expropriation was unlawful was clearly correct and this question does not merit review. Cuba's action violated well established substantive norms of customary international law as well as the standards incorporated in the Amendment.

Our Brief to this Court in *Sabbatino* (pp. 44-49) and the Court of Appeals' first opinion herein (307 F.2d at 864-68) adequately set forth the authorities establishing that an expropriation, such as this one, unaccompanied by compensation and involving retaliation and discrimination against the nationals of one country violates international law. Petitioner's argument (p. 19) that this particular confiscation was neither retaliatory nor discriminatory is refuted on the face of the expropriation decree itself and has been continuously rejected below. See Pet. App. 60, 383 F.2d at 183; 307 F.2d at 864-68; 193 F. Supp. at 382-85. There is no need to repeat again the grounds for that rejection.

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* "The congressional standard requires full compensation for any taking of a corporation or other business association more than 50 per cent beneficially owned by United States citizens irrespective of the nominal nationality of the corporation." Pet. App. 64, 383 F.2d at 185.

Moreover, Cuba's failure to pay compensation* in and of itself was violative of international law. Petitioner asserts that no such standard exists,** but the municipal, international arbitral and judicial tribunals which have considered the problem are nearly unanimous in recognizing that international law does require compensation for the taking of alien owned property. The actual customs and usages of civilized nations demonstrate that almost all recognize the requirement of compensation. The position of the United States and other western capital exporting nations is undisputed. Capital importing or "underdeveloped countries" as well as socialist states have actually provided compensation upon expropriation of alien owned property and recognize the obligation in their treaties,*** internal laws and constitutions. The authorities have been fully discussed in our Brief in *Sabbatino* (pp. 35-44) and are also set forth in a recent report of The Committee on International Law of The Association of the Bar of the City of New York, *The Compensation Requirement in the Taking of Alien Property,* 22 N.Y.C.B.A. RECORD 195 (1967). The existence of a few vocal dissenters

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* "Although a system of compensation was formally provided, the possibility of payment under it may well be deemed illusory." 376 U.S. at 401-02.

** Petitioner can gain no comfort from the initial decision of the Court of Appeals or the decision of this Court. The Court of Appeals simply chose not to treat the compensation issue independently because the three combined elements were present (307 F.2d at 864), and this Court, as we pointed out, p. 6, *supra,* specifically stated that it was in no way denying the existence of a standard of international law.

*** Of particular interest is the treaty between Japan and Cuba, concluded in 1960, providing that "property of nationals and companies of either Party shall not be taken . . . without just compensation." Jennings, *The Sabbatino Controversy,* 20 N.Y.C.B.A. RECORD 81, 88 (1965).

cannot impair the validity of the general rule. *E.g.*, Jennings, *supra* at 86; Collinson, *Sabbatino: The Treatment of International Law in United States Courts*, 3 COLUM. J. TRANSNAT'L L. 27, 43 (1964); Cetti, *Sabbatino and the Act of State Doctrine*, 16 MERCER L. REV. 331 (1964).

Cuba's confiscation of C.A.V.'s property also violates the compensation standards incorporated in the Amendment in that it failed to provide any compensation at all. Petitioner attempts to negate the existence of these standards by arguing that Congress in the Amendment intended that international law be applied, that Congress cannot make international law, and that these standards are not in accord with substantive rules of international law. This argument is obviously self defeating, for when Congress enacted these standards it clearly intended they be applied in appropriate cases.*

While it is, of course, true that Congress cannot enact international law in the sense that courts of other nations will be bound to apply it, Congress can, as it did here, pursuant to its power to define and punish offenses against

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* If Congress had intended that these standards not be applied unless found consistent with customary international law, there would have been no reason to refer to them since the Amendment itself requires courts to give effect to the principles of international law. Moreover, one of the Amendment's main purposes was "to protect U. S. investment" throughout the world (110 Cong. Rec. 19559 (1964) (remarks of Senator Hickenlooper)), a purpose which surely would not be served if Petitioner's arguments are correct. The standards are intended to "spell out" the requirements of the traditional standard of prompt, adequate and effective compensation which our country has long espoused. 110 Cong. Rec. 24076 (1964) (extension of remarks of Senator Hickenlooper); 110 Cong. Rec. 23680 (1964) (remarks of Congressman Adair).

the law of nations, specify the rules of international law to be applied by United States courts. *Banco Nacional de Cuba* v. *First Nat'l City Bank,* 270 F. Supp. 1004, 1008 (S.D.N.Y. 1967). "The most certain guide, no doubt, for the decision of . . . [international law] questions is a . . . statute of this country." *Hilton* v. *Guyot,* 159 U.S. 113, 163 (1895); see *The Paquete Habana,* 175 U.S. 677, 700 (1900). Even if applicable principles of international law were doubtful (as they are not here), the congressional direction would represent the supreme law of the land and must be followed. See *The Paquete Habana, supra* at 700; *Hilton* v. *Guyot, supra* at 163. International law "like all common or statute law . . . bends to the will of Congress." *The Over the Top,* 5 F.2d 838, 842 (D.C. Conn. 1925).

6. As the Court of Appeals observed, municipal courts are certainly competent to decree restitution and there is question whether the matter of the remedy is a feature of municipal or international law. 307 F.2d at 868. Even assuming as Petitioner does, however, that the remedy is solely a question of international law, there can be no doubt that international tribunals, and hence domestic courts applying international law, are competent to decree restitution. *E.g., Chorzow Factory,* P.C.I.J., ser. A, No. 17 at 4, 47-48 (1928) (*dictum*); *Portuguese Religious Properties Case* (France, Great Britain and Spain v. Portugal), 1 U.N. Rep. Int'l Arb. Awards 7 (Perm. Ct. Arb. 1920); Jennings, *supra* at 85; Cheng, *The Rationale of Compensation for Expropriation,* 44 TRANSACT. GROT. SOC'Y 267, 291-92 (1959). In any event, in this case, involving only the proceeds of sale of the sugar, "damages" and "restitution" are identical.

CONCLUSION

The decision below is clearly correct. This Court has settled the proper role of the "act of state" doctrine and the decision below does not impinge upon it. There is no conflict of decisions. The case, in its present posture, involves no questions of general importance, requiring review. The Petition should, therefore, be denied.

Respectfully submitted,

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January 25, 1968

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 968

BANCO NACIONAL DE CUBA,

Petitioner,

against

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,

Respondent,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS,

Third-Party Respondents.

MEMORANDUM OF RESPONDENT FARR, WHITLOCK & CO. IN OPPOSITION TO PETITION FOR CERTIORARI

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New York, New York 10005

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Third-Party Respondents.

MEMORANDUM OF RESPONDENT FARR, WHITLOCK & CO. IN OPPOSITION TO PETITION FOR CERTIORARI

On March 23, 1964 this Court reversed the decision of the United States Court of Appeals for the Second Circuit herein and remanded the case to the United States District Court for the Southern District of New York for further proceedings not inconsistent with its opinion. 376 U.S. 398.

Among other things the Court denied the motion of Compania Azucarera Vertientes-Camaguey de Cuba

("CAV") to be substituted for Receiver Sabbatino, the receivership having been terminated by the Supreme Court of the State of New York, County of Kings, on September 14, 1962. *Schwartz* v. *Compania Azucarera Vertientes-Camaguey de Cuba*, 39 Misc. 2d 63. The denial was without prejudice to renewal after the remand. 376 U.S. 407.

For reasons presently irrelevant this respondent ("Farr") thereafter moved in the District Court under Rule 14 of the Rules of Civil Procedure for leave to serve a third-party complaint against CAV and Lehman Brothers, attaching to the notice of motion a copy of the proposed complaint. J.A. 2a. The proposed complaint was based upon Farr's indemnity agreement with CAV and its escrow agreement with CAV and Lehman Brothers. These agreements are referred to in this Court's opinion at 376 U.S. 405 and 407.

This motion came on to be heard on October 30, 1964. The District Judge granted the motion and an order to that effect was entered November 12, 1964, J.A. 3a. By this time the Hickenlooper Amendment had become law, being the Act of October 7, 1964, 78 Stat. 1009.

At the hearing on October 30, 1964 counsel for Farr, CAV and Lehman Brothers spoke of their intention to move again to dismiss the complaint on the basis of the Hickenlooper Amendment, and notices of such motions were served promptly thereafter. J.A. 9a-13a.

CAV and Lehman Brothers have responded to their engagement under the indemnity and escrow agreements by prosecution of their motion to dismiss. Farr adopts their arguments that the pending petition not be granted.

The petition contains various irrelevant statements critical of Farr. Although rejecting these remarks, because of their irrelevance Farr will not presently address itself to them.

CONCLUSION

The petition should be denied.

New York, New York
January 23, 1968.

Respectfully submitted,

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Supreme Court of the United States

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against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS.

PETITION FOR REHEARING

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Attorneys for Petitioner.

March 27, 1968.

Supreme Court of the United States

October Term, 1967

No. 968

BANCO NACIONAL DE CUBA,

Petitioner,

against

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS.

Petition for Rehearing

Petitioner prays that this Court grant rehearing of its order of March 4, 1968, denying the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on July 31, 1967, and that the petition for certiorari be granted.

Reasons for Granting Rehearing and Issuing the Writ

Substantial grounds available to the petitioners and not previously presented exist in this case within the meaning of Rule 58 of the Court, in that statements of law appearing in respondents' brief in opposition to the writ call for a more complete response, here made for the first time and because there are other substantial grounds available to the petitioner not previously presented.

I

This Court's denial of the petition will leave standing the Court of Appeals ruling that, in treating the nationalization of corporate property within the territory of the nationalizing state, the courts may ignore the corporate identity of the nationalized company and may look instead to the presumed nationality of its stockholders. Such a conclusion flies in the face of the universal practice of all nations in the area of international law and is productive of endless mischief. It is not required by the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) and there is no evidence that Congress intended such a result.

The Court of Appeals cited no authority in support of its conclusion (at 383 F. 2d 185) that the corporate identity should be ignored. Instead, it repeated "with emphasis" its language in *Banco Nacional* v. *Sabbatino*, 307 F. 2d 845, at 861:

> "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only to the 'nationality' of the corporate fiction."

But it is clear that Cuba did not treat C.A.V. "in a particular way because of the nationality of its shareholders". Whatever may have been the rhetoric of the particular nationalization decree, the fact is, as the world knows, that Cuba treated all corporations within its territory in the same way, whether they were owned by United States citizens or Cubans. See, for example, *F. Palicio y Compania* v. *Brush & Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), affd. 375 F. 2d 1011 (2d Cir. 1967); cert. den. 389 U.S. 830.

C.A.V. chose to incorporate in Cuba. In so doing it avoided many obligations to the United States—for instance, the obligation to pay taxes. In the absence of

clear authority requiring the disregard of the corporate structure or an unequivocal direction from Congress, it should not now be permitted to hide behind the flag of the United States. We find neither any such clear authority nor such direction from Congress.

The Court of Appeals cited no authority in support of its conclusion that the corporate identity should be ignored. However, in its opinion in the *Sabbatino* case (307 F. 2d at 861), it did cite a number of authorities as so holding. The respondent, in opposing the writ in this case, relied on two of those cases, namely, *Delgoa Bay Railway Co.* [1902], For. Rel. U. S. 848 and *El Triunfo* [1902] For. Rel. U. S. 859.

We cannot in the present posture of this case embark upon a full scale analysis of these and similar cases. Admittedly they are difficult to read and most complex in their presentation of the facts, but we submit that no one who examines this and other similar litigation can come to the conclusion reached by the Court of Appeals and the respondent. The *Delgoa* and *El Triunfo* cases are perhaps typical of many cases. In both cases the United States, acting in a diplomatic, not a judicial forum, made claims *only* on behalf of United States stockholders of foreign corporations; in both cases the issue of damages to the stockholders was submitted to arbitration under an agreement; in neither case was there any consideration of the rights of the corporation or of its nationality. The scope of the arbitration and the issues before the arbitral tribunal would have been exactly the same whether United States citizens owned 1% or 99% of the stock of those companies.

The procedure followed in *Delgoa Bay* and *El Triunfo* could presumably be followed in the Cuban situation as well, not only as to C.A.V. but as to all other companies in which United States stockholders have an interest, if the time ever comes when Cuba and the United States can resolve to submit such matters to arbitration.

Nor was the Court of Appeals correct in concluding that in the *Standard Oil Tankers* case, 22 Amer. J. Int. L. 404, "... a sovereign took action against a corporation because of the nationality of the corporation and not because of the nationality of the shareholders" (383 F. 2d at 166). We do not know the motivation for Germany's action in that instance, but it is not unreasonable to assume that it was motivated at least in part by the fact that the German corporation whose property it used to pay reparations to the Allies was owned by a United States corporation. Certainly that was considered by the shareholders to be a fact of prime importance, and was the principal issue in the litigation that followed.

We suggest that it is dangerous to let questions of international law be determined by speculation as to the reasons which cause foreign governments to act as they do. Such a consideration will add but one additional difficulty in a field which already has too many.

Nor does the Hickenlooper Amendment require the result reached by the Court of Appeals. The holding we urge, namely, that C.A.V. be treated as a Cuban corporation, will leave plenty of room for the Hickenlooper Amendment to operate; many of the companies whose property was nationalized were incorporated in the United States, e.g., First National City Bank and Chase Manhattan Bank, and there is no reason to believe that Congress, in passing the statute, intended to cover other kinds of situations. Certainly the ambiguous reference in the Hickenlooper Amendment to "other standards set out in this subsection" [presumably a reference to 22 U.S.C. § 2370 (e)(1)] does not require the result reached here. Section 2370(e)(1) was passed at an earlier session of Congress. It bears no relation at all to the act of state doctrine; it merely provides that the President shall withhold foreign aid to any country which has nationalized the property of any corporation beneficially owned by United States citizens to the extent of

50% or more. Such a determination by Congress with respect to foreign aid certainly is no indication that Congress also intended to suspend the application of the act of state doctrine in such cases. If it had so intended, it could easily have said so. Its constant reiteration that it intended to conform to the principles of international law would indicate no intention to breach that law by disregarding the fundamental rule that a corporation is a citizen of the state of its incorporation.

II

The reasons for the act of state doctrine are set out in the *Sabbatino* case. Primary among them is the determination by this Court that there are sound reasons, dictated by the doctrine of separation of powers and by elements of judicial discretion, why it should not be required to pass upon the questions raised by an act of a foreign sovereign in nationalizing property within its own territory.

The incidence of the expropriation of the property of aliens in one form or another is likely to increase rather than decrease in the coming years. Given the economic position of the United States throughout the world, it is inevitable that United States corporations will find that their property will be among the property expropriated. The consequence may well be endless litigation presenting to this Court all of the problems which it sought to avoid in the *Sabbatino* case and the scores of cases which preceded it—problems which are primarily political and which come within the area usually reserved to the Executive Branch. We have argued that Congress has no power to direct the Judiciary in the exercise of its traditional power to abstain when a decision will, in its judgment, interfere with the separation of powers between the Judicial Branch and the Executive Branch or when the Court is confronted with a request that it decide a political question.

We know of no decision holding that Congress may direct the Court to make such a decision and certainly all of the reasoning in cases such as *Baker* v. *Carr*, 369 U.S. 186, would seem to indicate that a congressional direction to the Court under these circumstances would be inappropriate. Similarly, this Court in its decision in the *Sabbatino* case specifically referred to the doctrine of the separation of powers when it noted that the act of state doctrine had "constitutional underpinnings" (376 U. S. at 423).

The Court of Appeals, like the District Court, sought to meet this argument by reference to cases in which, it said:

> ". . . the courts have changed their position due to intervening federal legislation and have decided issues which they had formerly refused to decide. The cases involve issues substantially different from the issue in the case at bar but all show a judicial policy of deferring to legislative judgment when such a course is not barred by constitutional considerations." 383 F. 2d at 181

In support of this conclusion the court cited several cases in which such deference to legislative judgment is claimed to be manifested (see footnote 17 at p. 181). We do not believe that any of such cases are in point and we do not know of any other cases treating the issue.

Most of the cases cited illustrate a commonplace of jurisprudence. When on a given set of facts, a party has no standing to sue or for some other reason cannot allege a cause of action, the court will dismiss his complaint. If subsequently Congress amends the law giving plaintiff (or another plaintiff similarly situated) the capacity to sue or in some other way remedying the defect which caused the original dismissal, the Court, on the second time round, will defer to Congress. Thus, for example, *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U. S. 118, and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, like *City of Atlanta* v. *Ickes*, 308 U. S. 517, are traditional cases in which actions were dis-

missed because plaintiff had no capacity to sue. Congress thereupon enacted legislation giving persons similarly situated the power to sue and in *Scripps Howard Radio, Inc.* v. *F. C. C.*, 316 U.S. 4 and *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943) that statute was enforced. This is fully discussed by Judge Frank in his opinion in *Associated Industries* v. *Ickes*, *supra*, at 703. Those cases bear no resemblance whatsoever to the instant case where this Court's decision (in *Sabbatino*) was not based upon a defect in capacity which was met by an act of Congress.

Similarly, we cannot see that a comparison between *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 and *Byers* v. *McAuley*, 149 U.S. 608, on the one hand, and *Markham* v. *Allen*, 326 U.S. 490, on the other, can be of any assistance to this Court. In the first case the Court found jurisdiction but felt that it should abstain from decision. Cf. *American Federation of Labor* v. *Watson*, 327 U.S. 582. The *Byers* case is one of jurisdiction as is *Markham*. In none of them was there a change in the position of the Court caused by the enactment of a statute.

Similarly, *Willing* v. *Chicago Auditorium*, 277 U.S. 274, and *Aetna Life Insurance Co.* v. *Howarth*, 300 U.S. 227, are quite irrelevant to the issues before this Court. In the first case the Court found no case or controversy and hence no jurisdiction; in the second case the Court found a controversy. There was no statute which conferred the jurisdiction which the Court found missing in the *Willing* case.

Basically, of course, the Court of Appeals begged the constitutional question raised by petitioner. It found that Congress had the right to direct the court to make decisions unless there is a constitutional impediment to such legislation. We argue that there is, indeed, a constitutional impediment to such litigation, namely, the separation of

powers clause which leaves to the courts alone the question of determining the justiciability of a question which is presented to it.

III

We are aware, of course, that a denial of a petition for certiorari is not a decision by this Court on the merits; however, in practical terms it will have a profound effect on the other Cuban litigation pending both in the Second Circuit and elsewhere, and will be widely interpreted by lower courts as dispositive of many of the issues in such litigation. It will mean that the other litigation will be more difficult and protracted than need otherwise be since the cases are of such importance that the litigants are likely to make further application to this Court for a final determination of the issues presented by this petition herein, some of which are discussed above.

It may be that after full briefing and argument before this Court the decision of the Court of Appeals would nevertheless be affirmed. We most respectfully suggest, however, that petitioner should have the opportunity to make such full presentation. Only in that way can the questions raised by the interaction of the *Sabbatino* decision and the Hickenlooper Amendment be finally resolved for the enlightenment of both the lower federal courts and the parties in subsequent litigation.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: March 27, 1968.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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